Hon. A. P. Upshur -
from the author.

AN ESSAY

ON

TRUSTS AND TRUSTEES:

IN RELATION TO THE SETTLEMENT OF REAL ESTATE—THE POWER OF TRUSTEES—AND INVOLVING MANY OF THE MOST ABSTRUSE QUESTIONS IN THE ENGLISH AND AMERICAN LAW OF TENURES.

By H. M. BRACKENRIDGE,
FORMERLY JUDGE OF FLORIDA.

"*Ex fumo dare lucem.*"

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To the Hon. R. B. Taney, *Chief Justice of the United States*, and the Hon. R. B. Magruder, *of Maryland:*

Gentlemen: Some years before you were called to the judicial stations which you at present occupy, with so much honor to yourselves and benefit to your country, the humble production now offered to the public was submitted to your enlightened judgment. The author had been desirous of obtaining the opinions of some eminent members of the bar of Maryland, on account of the division of the courts into those of law and equity, unknown in Pennsylvania, as well as the more frequent occurrence of those abstruse questions arising on the law of tenures, on trusts, and entailments of estates. It was at the time a cause of much gratification to him, to find that *your views of the subject submitted accorded with his own.*

Since that time, the production has been retouched and enlarged, so as to form an Essay

which may be of use to the profession, at least to the student. Various copies are now extant in manuscript, a circumstance which seemed to suggest the propriety of giving it to the press, with the benefit of my corrections.

After these explanations, permit me to offer to you this fruit of careful study and much reflection—much greater than might be supposed, from the number of its pages. Permit me, at the same time, to take this occasion to express my high respect for yourselves, individually, and as dispensers among your fellow-citizens of that divine attribute, JUSTICE.

With the best wishes for your happiness,
I remain yours, very sincerely,

H. M. BRACKENRIDGE.

WASHINGTON, *April* 10, 1842.

INTRODUCTION.

THE author of the following Essay having had occasion to examine critically a particular instrument of writing, in order to form an opinion of its legal effect and operation, was gradually led into a wider field of inquiry. It was thus that the valuable treatise of Sir William Jones, on Bailments, was merely designed as a commentary on the case of Coggs vs. Bernard. At present a law library would be incomplete without that beautiful production. The author is very far from indulging the hope of a similar success; yet works of this kind are particularly valuable to the student, because they not only explain the principles of the science, or of a branch of it, but exhibit, also, the practical application to a particular case. They not only furnish materials, but show how to work them up.

It is by no means the design of this little volume to give a complete treatise on the whole of the law of trusts and trustees, and on the various topics connected with them; this has been done already by several authors, such as Gilbert, Sanders, Cornish, Willis, Wilson, &c.; but merely to illustrate some important points; for which reason, it is nothing more than what it professes to be—an Essay. But it is an essay in a kind of learning, perhaps, the most abstruse that ever racked the human brain. The doctrines of uses and trusts, of estates tail, of remainders and reversions, of powers and estates by implication of law, of springing uses, resulting trusts, and other topics of a kindred nature, connected with the tenure of real estate, under the common, and equity law of England, are so excessively subtle, that they may be regarded as the equations and conic sections of the system. When the author received his professional education, they were considered the proper studies to form the mind of the lawyer; and they were certainly calculated to sharpen the discriminating faculties of the mind, if they did not tend to enlarge them. If

any exercise can give a keener edge to human wit, and enable it to

"———divide
A hair 'twixt south and southwest side,"

it is the study of this singularly artificial system, created by the metaphysical ingenuity of the English lawyers and judges.

Of late years, this abstruse part of the law is less studied than formerly, commerce having opened a much wider, and perhaps more agreeable field. It is undoubtedly the policy of this republican people to simplify the law in all its branches, and more especially in what relates to real estate In many respects it has been simplified, and, in *skilful hands*, it is susceptible of still greater improvement; for to simplify it, is to improve. It is not the policy of the United States to throw difficulties in the way of the acquisition of real estate, or of its alienation, as it is in England, where an aristocracy must be kept up as one of the great divisions of power. Although we have done much, there is still room for reform. The members of the profession

amongst us, will not be the first movers of this reform. Those advanced in life, especially, are not willing to make themselves familiar with a new doctrine, in lieu of that which they have mastered with so much labor; and hence, under the plausible pretext of dangers from removing ancient landmarks, and unsettling titles, they are unfriendly to all innovation, however cautiously and gradually made. Much, notwithstanding, has been done in Pennsylvania, although less than in New-York,* and some other States, to escape from the excessively fine-spun and microscopic subtleties of the English law of tenures, which, in more than one instance, have driven even the most astute of the lawyers of that country almost to despair. Perhaps a single act of Assembly might embody many useful alterations and improvements, without any of the dangers so much apprehended. The writer has often thought, that in many instances, the most impor-

* The alterations in New-York have been effected, perhaps, with more boldness than skill; these have produced uncertainty, and have given rise to many questions, which, under the old system, had been settled. We might profit by these errors.

tant principles of this branch of the law, as in other imperfect sciences, have been settled by the mere force of superior ingenuity in reasoning of some persons over others—as the strongest arm heaves the bar beyond the farthest mark.

In Pennsylvania, law and equity do not, as in England, and in many of the States, exist as separate systems; the exact ideal boundaries between them, are, therefore, not always present and familiar to the understandings of our lawyers, and they are consequently sometimes blended in such a manner as to be productive of error and confusion. Equity is said to be a part of the law of Pennsylvania; that is to say, its principles are invoked and applied in our courts, where, in England, they could only be effective in a court of chancery. But it is often necessary to keep in view the artificial distinction, as if they were recognized only in separative courts, and more especially in cases of *equitable estates arising under trusts and executory contracts.* From not keeping these distinctions in sight, the *legal* estate is often confounded with the *equitable,* and an undue importance

assigned to the former, when, in fact, it is greatly lessened, in consequence of the want of a court of equity. The equitable estate is the substance, the kernel, while the legal estate is but the shell. The legal trustee has been called the mere conduit pipe for the equitable estate. He merely takes the legal seizin, holds the possession of the land, and the title deeds, subject to the call of the person for whose benefit the equitable estates have been created or declared; for the trustee can neither create nor declare such estate, excepting in those cases where he takes a beneficial interest, and *is at liberty to defeat the trusts if he pleases.* Hence a mere power to convey the legal title has been confounded with the power to create the equitable estates; whereas the writings executed by the trustees, form, by relation, a part of the will, or deed, which contains the trust, and can be nothing more nor less than is *definitively, clearly, and legally declared there.* The trustee holds the legal estate until the time arrives for carrying it to the equitable, or until called for through the chancellor, in case this be neglected or refused. Sometimes the legal con-

veyance is presumed to have been made, when it was the duty of the trustee to make it, as it would not be equitable to suffer the party for whose benefit the trust was created, to be injured by the neglect of the trustee. All that he can do, except in those cases where he is expressly required to retain the possession of the estate for a special purpose, as for accumulation, or as the separate property of the wife, or for a fixed period, or until the happening of a particular event, (but within the rule against perpetuities,) is to clothe with the legal title the estate already created and existing in equity, but with no enlargement of, or variation from, that declared in the will, or deed of trust. This can only be done by a trustee, who has power to defeat the trusts in virtue of a general power; because, in such cases, the rule of perpetuity does not apply.

The doctrine of relation, which is of great importance in trusts, proceeding, in this instance, from the rigid rule which forbids the restraining alienation for a longer period than a life or lives in being, and twenty-one years afterwards, re-

quires that the conveyance in pursuance of a *particular* power, shall read as if inserted in the trust deed, or will, so that the trusts cannot be prolonged, or the period of restraint on alienation greater than is allowable, counting from the time when the estates are created. Important as this doctrine is, there are many individuals of respectable standing in the profession, who do not know the difference between a power, and a common letter of attorney.

The want of a court of equity with us is felt, on account of the specific remedy which it might afford in compelling the trustees to execute such conveyances as they are required to make, or to execute the trust by delivering the possession; but this is remedied, in some degree, by assuming that such conveyances have been made, and by regarding the person having the equitable right as the actual owner, for almost all practical purposes—at least when in actual possession. Even in England, this possession is *prima facie* evidence of the execution of the trusts. The legal title is also of less importance,

since our courts of law take notice of the equitable estate, equity being part of the law; and a person having nothing but the equitable interest, may implead, or be impleaded, as if he were the legal owner, or use the name of the trustee with or without his consent.

There has been a recent instance of legislation in Pennsylvania, where the framer of the bill might be supposed to have proceeded on the erroneous idea, that, in consequence of the lapse of time, or the neglect of the trustees to make conveyances of the legal estate, the *equitable* estate had not been created—but for the declaration in the law, that the object is to *remove doubts* that might be entertained on the subject. How far this was necessary or proper, the writer does not undertake to say. From what is set forth in the explanatory part of the law, it appears that an *equitable estate tail* was given, by the will, to the unmarried daughter of the testator. The necessary consequence of this was a tenancy by the curtesy in her husband, if she had issue by him capable of inheriting; and this was a consequence

which the express declaration of the testator to the contrary could not prevent. The legislative act giving him an estate for life was, therefore, superfluous. In the life time of his wife, according to that state of the case, he might have joined her in barring the remainders and converting the estate into a fee simple, under the act of assembly, by merely conveying it, and receiving it back. With respect to the unborn grandchild of the testator, he could not, by any contrivance, give her *less* than an estate tail, or prevent her from barring it except by a resort to the subtle contrivances of strict settlement, if such contrivances would not be rendered nugatory by the sweeping provisions of the act referred to, whose aim was to prevent the tying up estates from alienation. If nothing of this kind was attempted, the grandchild would take a fee simple, and all limitations beyond this would have been void. But the idea of prolonging the trust, or, rather, extending it to the grandchild by law, can only be considered as an experiment, in which the lawyer who drew the law, in all probability, had little confidence. The legislature

might as well undertake to make a will for a deceased person, or direct in a particular instance the disposition of property, without regard to the legal rights of third persons. It may, however, be necessary and proper to have recourse to legislative aid to remedy some defect of formality, not affecting the essential right of the case, or to remove ill-founded doubts in the public mind, which may seriously affect the value of title to real estate, and where it is of sufficient magnitude to justify this interposition on the grounds of public policy. The writer does not wish to be considered as giving any opinion in the case alluded to, having seen nothing excepting the imperfect state of facts contained in the law itself; an inspection of the will might possibly satisfy him, that the course pursued *was rendered necessary by peculiar and extraordinary circumstances.* It seems strange that a person should be unwilling to confide the full ownership, and disposition of the estate, to the immediate object of his benevolence, but postpone the more perfect right over it in favor of those he may never see, or never know, and when the

chances of an imprudent use being made of it, would be increased.

It is a remark often made, that men are desirous to have the dispositions of their estates revocable in their own time, and irrevocable ever after. The desire of exercising ownership, even after death, is almost universal; but this is impossible, in the nature of things, although the laws have gratified it to a certain extent, by allowing testamentary dispositions, and permitting estates to remain in suspense, in the cases of executory devises, and future or springing uses, for a determinate period. It is owing to this, that so many questions have arisen, and still arise, on the interpretation and operation of wills, and on the settlements of estates by deeds of trust. It has not unfrequently happened, that the excessive ingenuity sometimes experimentally exerted for these purposes, has led to results quite the contrary from those intended. Common prudence would dictate that its measures should be governed, in some degree, by circumstances; and those continually vary, or are but imperfectly

foreseen. No one can always entirely rely even on his own judgment, much less can he safely confide in the discretion of another whose sagacity is not even quickened by self-interest. This strong desire to transmit estates in particular lines of inheritance, or with conditions and contingencies annexed, has led to contrivances which have failed, sometimes from the want of some trifling provision which escaped the notice of the experimenter. The danger of this kind of *learning beyond the law*, has been remarked by Coke, who mentions the case of Justice Richel, a learned judge, who settled his estate on his seven sons in succession; but for the want of sufficient seizin in the first taker, the whole of the limitations failed. It is said that Lord Coke himself was unfortunate in the limitation of his own estate; at least such is the inference from a passage in Fearn's work on remainders.

The power to convert an estate tail into a fee simple must necessarily have the effect to change the line of transmission, in one or two

removes, at farthest from the first owner, in spite of every endeavor to prevent it. We have, consequently, no other security for retaining real estate in a family, but by forming its members to the same habits of industry, frugality, and enterprise, by which it was first acquired; and for this reason, *the acquisition of more than a moderate share of wealth is not wise or desirable.* Let us suppose the case of a female who has an estate in her own right; if it be in fee, it may go at once out of the family whence it came; if an estate tail, the wife may join her husband, and turn it into a fee, and if she dies without issue, it passes to the heirs of the husband, and *from the blood of the first purchaser.* On the male side, wealth rarely lasts in this country beyond the second generation; and in the case of female heirs, restraints on marriage (where every kind of restraint is odious) are almost certain to produce effects directly contrary to those intended, not to speak of the temptation presented to the artful and designing, by thus exposing a prize in the person of the inexperienced and inconsiderate. Here

no dragon can be placed to guard the golden fleece. In England, the distinction of ranks, and the legal restraints on marriages, oppose obstacles which are but little known here; although, as wealth increases and inequality of conditions prevail, the desire will probably grow up to make artificial settlements of estates, for the purpose of retaining them in families; and ingenuity will be set to work to accomplish this object, at variance with our present habits, institutions, and democratic feelings. But without a change in the statute of distributions, the establishment of a court of equity, and the repeal of the law facilitating the barring of estates tail, and perhaps restricting the liability of lands for debts to the writ of elegit, little can be done for that purpose, if it were desirable.

The real estate of a country where competition and enterprise are left free, will centre, soon or late, in the hands of the more industrious and prudent. It is right it should be so, and any legislative interference to prevent it, is an attempt to

interrupt the natural course of things, and against the true interests of a republican community. In England it is of the first importance to preserve power in aristocratic families—the hereditary legislators of the nation, according to the frame of government of that country. But with us the policy is to permit real estate to circulate freely, and without restraint, placing it within the reach of those who have the means and desire to acquire it like any other property; and this must be done by giving every possible right of ownership to the present beneficial tenant of the estate for life. In this way real property is more likely to be improved, and rendered subservient to the purposes of society; which would not be the case were the tenure of the immediate owner of uncertain or limited duration. The greater the number of freeholders the broader the pyramidal base, and the greater the diffusion of power among the people. It may almost be laid down as a maxim, that power in a nation always follows the possessors of the landed interest. The liberties of Rome never

recovered from the proscriptions of Scylla, or of Augustus, who seized the lands of the peaceful husbandman, and distributed them by agrarian laws among their soldiers.

Among the most remarkable modes of dividing lands adopted by different nations, are those of the children of Israel in Palestine, those of the feudal system in Europe, and the free allodial distributions of America. Each of these are worthy of deep study and close examination by the philosophic statesman. The Hebrews, who entered Palestine in numbers sufficient to occupy at once that small territory, first divided it among the several tribes, and each tribe apportioned them among the families; thus bringing almost every foot of ground capable of cultivation, or habitation, or pasturage, into useful occupancy, as the separate, independent property of the individual owner. The fruits of this were seen in their long continued prosperity, and high state of moral and political improvement, compared to the surrounding nations. The feudal plan was

entirely different. Preserving its warlike character, for the purpose of defending by arms that which had been obtained by force, the king, or chief, was regarded as the owner of all the lands, which he proceeded to parcel out among his principal followers according to his pleasure, on the condition of being always ready to attend him in his wars; and these chiefs again subdivided their districts, or estates, among their immediate followers and subordinate dependants, on similar conditions of military service. Each of these principal feudatories was thus the head of a military power, ready to be called out by the sovereign, and, as might be expected, equally disposed to be roused to arms in his own private quarrels. Such a plan might answer for defence against the frequent attacks of marauders in those barbarous ages, but it was destructive of peace and quietness, and directly opposed to the progress of agriculture, commerce, and the elevation of national character. How different from the mode of acquiring real estate by individuals in America! In general, land in this

part of the world has been regarded as an article in the market, to be bought and sold to suit the convenience and pursuits of the people, and is every where the reward of successful industry, if desired. There can be nothing more perfect than the plan adopted by the general government, of dividing the public lands into small lots, of sufficient size for a moderate farm, so as to place it in the power of every economical laborer to become a freeholder, which in some countries is equivalent to a title of nobility. Without saying any thing further of the two first modes of acquiring real estate, I may be at liberty to affirm that ours is, to say the least of it, the best adapted to our circumstances and situation. We should not encourage the accumulation of land in families, and still less in mortmain, or corporations of any kind, religious or otherwise, an evil which I fear is already beginning to show itself. Nor should it foster any contrivance to prevent the free use and disposal of real estate by the actual or beneficial owners.

The common law use is said to have been borrowed from the *fidei commissum* of the Roman civil law, by the clergy, who applied it to answer their own purposes. It differed essentially from the *usufruct* of that law, that is to say, a right to use or enjoy a thing not our own, like the bailment of a chattel. The person having the old, or common law use, it is laid down, had neither *jus in re,* or *jus ad rem.* But great complaints were made against the abuses practised under the system which had grown up under that name. Statutes had repeatedly been passed for the purpose of remedying those evils, until the 27th of Hen. VIII, ch. 10, called the Statute of Uses, was supposed to have accomplished the work effectually. This statute was in substance as follows: "When any person shall be seized of *lands*, &c., to the use, confidence, or trust of any other person, or body politic, the person or corporation entitled to the use in fee simple, fee tail, or for life, or years, or otherwise, shall from thenceforth stand and be seized, or possessed of the *land*, &c., of, and in the like estates, as they

have in the use, trust, or confidence; and that the estate of the person so seized to uses, shall be deemed to be in him, or them, that have the use, or such quality, manner, or form, and condition as they had before the use." The framers of this law only deceived themselves, as all law makers are apt to do, who disregard the wants and convenience of the people for whom they legislate. These fiduciary dispositions of property had become necessary to their business and habits, and the law was in a short time evaded, not by the reëstablishment of the old use, but by the creation of a new system, under the name of trusts, avoiding the objectionable qualities of the former, and being moulded into one of greater certainty and utility. This evasion of the statute was effected by giving it a strict construction. It executed the possession of the *land* to the *first* use, but went no farther; and the second use attached itself to the first use under the name of a trust. Instead of saying, to A, for the use of B, a third name was introduced; thus: to A, for the use of B, *for the use of C;* and

the land of A, uniting with the use in B, made but one legal estate in B. But this, according to the strict construction, could only be effected once; the second use therefore did not unite with the land, but attached as a trust or confidence to the first use of B, and B was declared to hold in confidence for C. Another mode of explaining this piece of subtlety is, that the words of the statute are confined to persons seized in the foregoing manner of *lands*, &c., and the *seizin* of B is not of the *lands*, but of the use; hence the use of B alone being regarded, C has nothing at law; but as B is not intended to have the beneficial interest, courts of equity interpose and make him a trustee for C, the ulterior use being rejected by the courts of law. There are other modes of explaining this curious piece of judicial legerdemain, but in spite of them all, it must appear to plain common sense, if common sense can comprehend it at all, little better than a quibble. The new fiduciary right thus created under the name of a trust, was of a higher and more perfect character than the former use. Instead

of conferring no right to the land, it gave in fact the substantial ownership; it was the estate itself, although existing only by reflection or imitation, the legal estate now only existing for its benefit and convenience.

The power of keeping estates in suspense from the use and possession of *some* beneficial owner, was long contested in England; and the old common law maxim, that the freehold cannot be in abeyance, or vacant and unoccupied, was earnestly vindicated. It is but of recent date that executory devises and future trusts obtained a foothold. The law "abhorred a perpetuity," that is, the keeping estates unalienable for any period of time, *long or short.* A sort of compromise was effected at last, by limiting the period of restraint from alienation, to the term *of a life, or lives in being, and twenty-one years after.* Even this was grossly abused by an individual of great wealth, Mr. Thelusson, apparently a man of narrow, vain mind, who, with the aid of a skilful conveyancer, contrived to keep within

this rule, and yet extend the time when his immense estate would be beyond the reach of any one, and at the same time of no benefit to his descendants, for seventy or eighty years! His plan was, to take all the lives of his sons, and their sons then living, which were numerous, and then at the end of the life of the longest liver, vest in a grandson, or great grandson, on attaining twenty-one years of age, an immense estate, which, by accumulation, it is conjectured might amount to one hundred millions of pounds sterling—and this, to gratify the idle imagination of a moment, that a descendant of his might come to be the richest commoner in the world! I do not pretend to speak with absolute accuracy of this singular settlement, my object being merely to convey general ideas. Such indignation was excited by it that the act of 39 and 40, of George III, was passed, narrowing the rule, thereafter, *to the life of one person then living*, and twenty-one years after. The spirit of commerce, or more properly speaking, the spirit of the age, was opposed to the practice of

tying up estates from alienation, or personal property from use and beneficial appropriation, or placing it beyond the reach of enterprise and industry, to gratify the morbid vanity, or folly, or perhaps the unfeeling narrowness of heart, of a person unwilling that others should enjoy that which can profit him nothing, after the short and fitful fever of life is past.

In England, the art of conveyancing has become a mystery—an occult science, scarcely known to any but those who apply themselves solely and exclusively to this branch of the profession. The introduction of such a mystery is not desirable in this country. On this subject, Judge Kent has made the following very just observations: "The doctrine of settlements in England has become an abstruse science, which is in a great degree monopolized by a select body of conveyancers, who, by means of their technical and verbose provisions, reaching to distant contingencies, have rendered themselves almost inaccessible to the skill and curiosity of the profes-

sion at large. Some of the distinguished property lawyers have acknowledged that the law of entails, in its present mitigated state, and great comparative simplicity, was even preferable to those executory limitations upon estates in fee. Settlements, with their shifting and springing uses, obeying at a remote period the original impulse, and varying their phases with the change of persons and circumstances and with the magic wand of powers, have proved to be very complicated contrivances; and sometimes, from the want of *due skill in the artist*, they have become potent engines of mischief, planted in the heart of great landed estates." If such be the formidable objections to this science of conveyancing, what are we to think of the corresponding jurisdiction of a court of chancery, *for the purpose of giving effect to such superhuman ingenuity?* It is added by Judge Kent, that the acquisition of wealth in families may perhaps in time give rise to the necessity to some extent for these artificial provisions. If the effect of withholding such powers be to prevent the accumu-

lation of such wealth, it will prevent a much greater evil. The power of the English court of chancery over estates, is at present one of the greatest abuses in the British Government. The remark has been with too much justice applied to it by another writer, that in such cases, the courts of chancery remind us of the dreadful inscription seen by Dante on the gate which leads to the infernal regions—*Lasciate ogni speranza*—LEAVE HOPE BEHIND—IT NEVER ENTERS HERE.

AN ESSAY

ON

TRUSTS AND TRUSTEES, &c.

PART I.

When trusts are of an *executory* character, as in the present instance,* they are usually declared in *wills*, which are supposed to be entitled to a more liberal construction in favor of the intention than trusts in *deeds*, and in some respects can be more perfectly executed. But whether declared in deeds of *trust executed*, or in deeds of *trust executory*, or in wills, the particular intent, or secondary wishes, must often give way to the general intent, or to the rules of law. (1)

The law also annexes certain incidents to estates, notwithstanding the express declaration of

* See Appendix A.

the devisor, or feoffor, to the contrary; such as the alienability of a fee simple, the tenancy by the curtesy of an estate tail, and the barrable nature of such estate: to which may be added that insuperable barrier, the rule of perpetuity, which does not allow, by any contrivance, the tying up estates from alienation, for an indefinite period. (2)

Trusts are said to be in their very nature *executory*, and ought therefore to have a liberal construction. There is a legal distinction between trusts *executed*, and executory trusts. In the latter, the trusts are less perfectly declared, and something remains to be done by the trustees in carrying the intention more completely into effect. In England, executory trusts are consider-

(1) (2) 2 Fonb. 18, 52, 59, 95, 408–19. 1 Prest. Estates, 188, 382, 354. 9 Wheaton, case of Thompson Mason. Fearn, 325, id. 53. 1 Atk., 8. Amb., 478. Fearn, 563, 430. Forrest, 262. 2 Show., 398. Croke Eliz., 16. 1 Eden, 119, 195. 1 Coke, 129. 1 B. C. C., 75. 2 Sand., 77. 6 Cruise, 325. 2 Str. 1175. 6 D. and E., 213. 7 ib. 652. 1 Dallas, 139. 4 Dallas, 347. Cowp., 600.

ed little more than memoranda, to be afterwards perfected by a more complete declaration, and usually occur in wills and marriage articles, and necessarily requiring other writings; but hardly ever in conveyances, in which the feoffor is supposed to have declared the settlement fully, with a perfect knowledge of the legal effect of his expressions, and plan of limitations, having the advantage of mature deliberation and the advice of counsel. (3)

In the reported cases of the different States, or of the United States, I have not been able to meet with any one, where a court of equity has undertaken to *model* the trusts, as is often done by the Chancellor of England, directing in minute detail, a settlement of estates in a *technical* manner, with the design of placing a restraint on alienation; although the distinction of trusts *executed* and *executory*, is recognized by them in the abstract. But the construction of all trusts,

on account of their executory character, has been assimilated to that of wills, allowing to executory trusts and wills, perhaps a more liberal construction; in all of them, however, the first thing to be accomplished is the general intent, or leading object, and next, the particular intent, or secondary wishes. It was said by Lord Hardwicke, "that all trusts are *more or less executory;*" if they were not, they would be *legal* estates, executed by the Statute of Uses. It appears to me that, in Pennsylvania at least, where there is no court of equity, the party declaring the trust must do more for himself, and the court can do less for him, in decreeing a detailed settlement of the estate, with all the necessary clauses and provisions, than can be done by the Chancellor of England. Chief Justice Tilghman expressed regret at the limited power in cases of trust, and the legislature has not yet thought proper *to give this power of making strict settlements of estates, by adopting all the technical contrivances of the*

English conveyancers. The utmost regard which our courts would pay to the distinction of trusts executed and executory, would be that expressed by Lord Hardwicke, "that trusts are more or less executory," as they are more or less explicitly declared by the maker, and consequently more or less liberally construed; but I cannot conceive on what principle they would be construed differently from any other executory contract, or writing. (4)

It must be obvious to the lawyer, that if the maker of the trust had objects to accomplish beyond the general intent, and which were deemed of essential importance, they would have been better secured in a will than in a deed of feoffment, although that feoffment were a *trust* deed.

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(3) (4) 1 Prest. 384, 405. 1 Dallas, 139. 1 Hen. & Mumf., 290. 10 Johns. Rep., 505. 9 Sergt. and Rawl., 180. 2 Fonb., 36, 50–60, 90. 4 Fonb., 400–4. 8 D. and E., 5. 1 Dallas, 47. Sugd. Powers, 37, 139. 1 Vesey, 230. 2 Black. (Chitty) 84. 12 Vesey, 230. 1 Vesey, 234. 9 Mass., 514. Cowp., 600. Kent's Com., 4 vol., real estate.

His intention, at least, ought to have been fully, explicitly, and technically declared, the reverse of which is the case in the present instance. A difficulty suggests itself at once, which would not occur in a will. The trustees are required to make conveyances in *fee*, and yet they have only estates for life! In a will, it is not necessary to give the trustee any express estate, because he would take by *implication, or operation of law, an estate commensurate with that required to be executed.* The land descends to the heir until the will is executed, and all the estates of freehold under it, are served out of his seizin. But in a deed of feoffment to uses, or trusts in general, the feoffor having parted with his estate, subject to the under current of equitable limitations, these are to be served out of the seizin of the feoffee to uses, and the *legal* fee cannot pass in a deed without the word heirs, although the *equitable* fee may. The estate of the feoffees to uses, in the present case, is *entirely legal;* that

of the persons to be benefited by the trusts, *entirely equitable.* Like two parallel lines, they cannot coalesce, however they may approximate; that is, they cannot have a distinct existence in the same person, although the trustees may transfer their legal seizin to the trusts, thus converting these into legal estates.* But the legal seizin of the trustees, is only of an estate for life, in the present deed, and, therefore, not commensurate with the equitable fee. (5)

If the legal estate of the trustees be only for life, its longest period is for their own lives, and of course terminating with the life of the survivor; and even this estate arises by implication, there being no express declaration respecting its duration, and the technical word heirs, being omitted. How then can the estate be extended

(5) 2 Sand., 80. Cornish on Uses, 43–74. 1 Fonb., 34. 2 Fonb., 146. 1 Fonb., 137–82. 2 Prest., 63–5. 2 Fonb., 87. Sugd. Powers, 37, 140, 204. 1 Dallas, 139.

* The *equitable* may also merge by operation of law.

to the administrator, or executor of such surviving trustee? What relation or personal confidence can there be between the administrator, or executor of the trustee, and the author of the trust? How can the letters of administration, on the *goods and chattels, rights and credits,* of the *trustee,* give power over the *lands* of another person? How can the executor *of the will,* of one of the trustees, assume the authority of trustee as to *real estate* with which that will has nothing to do? As *descriptio personæ,* intended to succeed the first named trustees, it is too vague and uncertain, the persons thus intended as successors, being unknown, and possibly, there may never be such to answer the description. It refers to a contingent event, not only uncertain at the time, but incapable of being rendered positively certain. One may give directions to the executors of his own will, but to give these to the unknown executor of another person who is still living, and who has made no will, and may

never make one, to say the least of it is not usual. This clause, in a legal sense, may almost be considered, so far as relates to the main objects of the trusts, as without meaning. But it does not impose an imperative duty; they *may* associate, &c., and they may not. The first set of trustees must cease with the life of the last survivor, and the trust must either then be at an end, or be carried into effect by the court, or be perfected by the operation of law, where the person for whose benefit the trust was created is in the actual possession.

The author of the instrument appears to have supposed, that the trust could be continued in a new set of trustees after the death of the first, either by a vague designation, as in this instance, or by authorizing the first set to appoint successors at pleasure. If this could be done, it would be an easy matter to create a perpetuity. Estates might be held in suspense *ad infinitum*, in the hands of a

succession of trustees thus appointed. Where the objects of the trusts are not specially designated, as in the case of charitable uses, it is admissible; but where a specific estate is set apart for a particular individual, and the heirs or children of that individual, it must vest within a life or lives in being, and twenty-one years after, at the farthest; and this rule applies to trusts as well as to legal estates. But it is a principle of equity, that a trust cannot fail for the want of a trustee; the trust will be executed by the court, where there is a court of equity, and where there is no such court, as in Pennsylvania and in Massachusetts, every thing requisite for the execution of the trusts will be presumed in favor of the *cestui que trust* in actual possession. In another part of the instrument under examination, the first trustees are authorized to appoint other trustees. At the first glance, it would seem as if it was the intention that these should succeed the first set; but by using the word *associate*, the

idea is negatived, because they could not be *associated* with persons who had ceased to exist. Willis, in his essay on trusts, lays it down, "that a court of equity will control a trustee in the exercise of a power to appoint new trustees, though given in very large words. Trusts being a *personal confidence*, ought to cease with the trustee. Our law, however, continues the estate in a *deceased trustee*, to his *heir*, or if of a term of years, [a chattel interest,] to his executor or administrator. Still a new trustee is to be appointed, where the deed creating the trust, or the refusal or incapacity of the representative, requires it. This is effected either by the party beneficially interested, if he have a power for that purpose, or else through the circuitous and expensive medium of the court of chancery." I have no doubt that a special legislative act would be proper, where there is no court of chancery possessing extraordinary powers, to supply these defects of omission, from accident or want of technical skill,

where it is perfectly consistent with the intention of the feoffor, and the promotion of the interests of all parties concerned.

The equitable estates, or trusts, do not fall to the ground from the want of power in the trustees to convey the legal estates. Defective feoffments may be construed to be covenants to stand seized, where there is a sufficient consideration, as the consideration of marriage in C M, and of blood in the nieces, the naked legal seizin remaining, if necessary, in the feoffor, or his heirs, subject to the equitable estates, the beneficial interests having passed out of the feoffor, with the exception of a possible reversion on the failure of the whole of the trusts. An appeal may also be made, by those who have the beneficial interest, *and, therefore, entitled to call in the legal estates*, to the powers extraordinary of a court of chancery to supply the want of seizin in the deed; it appearing from the deed itself, as in the

present case, that it was intended to convey the complete legal title, "to be disposed of in the manner before mentioned," that is, to make conveyances in fee tail, to C M, and her children, and the fee simple to the nieces on the contingency of C M, or *her children, dying without issue.* (6)

To convey the legal fee, the word *heirs* is necessary in a deed at common law. This is still the law of Pennsylvania, however absurd; the reason for it, whether of feudal origin or not, is at present obsolete, and but for the danger of intermeddling with the closely interwoven law of tenures, would have been done away, as it has been in New-York, and some other States. The same thing is requisite in a deed to uses, where the possession is transferred to the use by the statute, thus making a legal estate by operation of

(6) See authorities, last paragraph, 2 Sand., 80, et al. Bacon, Uses and Trusts. 2 Wils., 22, 75.

law, and annihilating the fiduciary, or equitable estate, as existing at the same time independently of the legal. But where this transmutation of possession is successfully *evaded*, and the *use* still exists under the name of a *trust*, substituted in some measure for the use, as it stood *before the statute*, this trust, or equitable estate, may exist in the same deed with the legal, and the equitable fee may pass without the word *heirs*, if the intention sufficiently appear by other expressions, although the same indulgence is not shown as in a will. As for instance, a trust feoffment to A and his *heirs*, to convey to B, in *fee*. A, the trustee, can convey a fee to B, although the word *heirs* is not used in connection with B. In a will, the words *all his rights*, *all his property*, would have carried the fee. Let this be reversed, and let us suppose a feoffment to A, (without the word heirs,) to convey to B, in fee, or to the *heirs* of B. A, having only an estate for *life* by implication, (and it is the largest

the law can imply, where there is no express estate, and no words which the law considers equivalent,) cannot convey the *legal* fee, to the *equitable fee* of B. Yet the feoffor and his heirs may stand seized to the use of B, and thus in effect it may come to the same thing. In covenants to stand seized to uses, where the legal and equitable estates, by operation of the statute, center at once in the same person, the technical word heirs cannot be dispensed with. But in a covenant *to convey* (and defective bargains and sales, or feoffments, are now usually considered as such) and sufficient legal seizin in the covenantor, the courts will in general consider him as seized to the use of the person who has the equitable estate, provided there is a consideration, and sufficient words to show the intention. (7)

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(7) 2 Chitty's Black., 83, 266, and note. 1 Dallas 139. Precedents Conveyancing, 157. Sand. Uses, 1 vol. 123, 126; 2 vol. 98. 2 Prest. 64. Cornish Uses, 43, 74. 4 Dane's Abridg., 224. 1 Fonb., 34. Ambler, 387. 6 Cruise, 242, 243. 8 D. and E., 597. 10 Mod., 523. 2 Atk., 71. Gilbert, Law of Uses, 75.

The foregoing is laid down very explicitly in Preston's treatise on estates.

"The general rule is, that limitations of trust are to be construed in like manner, and by the like rules as limitation of legal estates; and therefore in *deeds*, the fee cannot pass by grant or transfer, *inter vivos*, without appropriate words of inheritance."

"But in *contracts to convey*, and in *trusts declared, in a conveyance*, the fee may pass, notwithstanding the omission of a limitation to the *heirs*."

"Therefore articles to convey to B, *in fee*, or a conveyance to A B, and his *heirs*, in trust to convey to C D, in *fee* simple, would confer a right in equity to call for a conveyance of the inheritance. So a conveyance to A, and his *heirs*,

in trust, *totidem verbis*, for B, in fee, would pass a fee."

"So there may be *a right in equity to call for the conveyance of the fee*, because there is evidence of an intention to convey the fee, although that intention be not expressed by a limitation to the *heirs*." Or as it is expressed by Kent, "it is likewise understood that a court of equity will supply the omission of words of inheritance; and in contracts to convey, it will sustain the right of the party to call for a conveyance in fee, where it appears to have been the intention of the contract to convey a fee." (8)

It is further observed by Preston, that, "the construction of law on the bargain and sale, *ought* to be precisely the same, after the statute as the construction of the court of chancery would have been, when the uses were fiduciary, and were under the immediate and peculiar jurisdiction of

that court." Such is the doctrine in Pennsylvania. (8)

It is the general rule, then, that the word *heirs* is necessary to convey the legal estate in *fee*, in a *deed*, and the exception is the case of the *equitable fee*, in a trust deed; and where, in that trust deed, the conveyance of the legal estate is to the trustee and *his heirs*, the person seized of the equitable fee without the technical word, may call for a conveyance of the fee from him; and where the legal fee is not in the trustee for the want of the word *heirs*, the equitable fee may still subsist in equity, because, "there is evidence of an intention to convey the fee." Or as it has been expressed, "trusts in deeds, and other writings, have the same fiduciary character since, that uses had before, the Statute of Uses." It is also established, that defective feoff-

(8) (8) 2 Prest., 65. 1 Fonb., 34. 4 Kent's Com., 7. Comyn's Dig., tit. chap. T.

ments may be considered as mere executory contracts to convey; or trusts may be regarded as covenants to stand seized to uses; in this manner narrowing the inconvenience of the rigid rule of the common law. (9)

In the case of Vanhorn's lessee, Chief Justice McKean struggled hard to make out a fee simple without the word *heirs*. He construed the deed to be a covenant to stand seized to uses, (it was not a trust,) but he found no words, either express or relative, that would carry the fee. The words of the deed were simply these, "gives, grants, freely, absolutely, and clearly, the premises, &c., all the rights, titles, and interest, claim and demand whatsoever." In a will these words would have carried a fee. As this was a use, (that is, the legal estate and the use both

(9) 2 Fonb., 90. 1 Prest., 386. 2 Sand., 80. 2 Fonb., 137. Do. 18. 1 Dallas, 13. 1 Fonb., 34. 2 do. 20. 4 Dane's Abr., 224. Fearn, 294. Croke, Eliz., 478. Coke, Lit., 96. 10 Johns. Rep., 496, 507.

centering at the same time in the first taker, instead of interposing a second person,) it was converted by the Statute of Henry VIII, chap. 10, into a legal estate, and then required the technical word heirs to convey the fee, which the skill of the lawyer might have prevented by simply adding five words, to wit: To A, for the use of B, *for the use of C—or* required something to be done by a trustee—such as to convey, or to receive rents, which might render it necessary for the trustee to have the possession for that purpose. The kind of estate to be conveyed was not even rendered certain by express relation, or reference to that of the grantor himself, or by the use of words necessarily enlarging an estate for life, to an estate tail, as for instance the words, "dying without issue." The deed under consideration, however, *is a trust*—the trustees are expressly required to convey in *fee simple*, to the nieces of the feoffor, on the happening of the contingency of C M "dying without issue;"

and in virtue of those words, either C M, or her issue, (in connection with her previous estate for life) takes an estate tail. It is declared in the deed, that the "complete legal estate of the premises," is vested in the trustees for the purpose of executing the trusts.

A doubt has been suggested, whether the nominal consideration of *one dollar*, paid by the trustees, is sufficient, where it is necessary in the covenant to stand seized, that a consideration should move from the cestui que trusts, or the persons having the beneficial interests. I do not consider this as a settled point, but there is no doubt that a consideration moving from any of the parties beneficially interested, will embrace all coming within the scope of the trust, especially in the present instance, where the particular estate of C M (according to the strict analogy between legal and equitable limitations,) is necessary to support the contingent remainder of

the nieces of the foeffor If this were the case of a will, that remainder might be an executory devise, which requires no particular estate to support it. The principles above cited are more fully explained in the excellent work on trusts, by Willis. In the present case, there is a sufficient consideration moving from all the parties; that of marriage in C M, and of blood in the nieces.

It may also be a subject of inquiry, which I do not mean to enter upon at length, whether the statute of limitations of Pennsylvania would not, in case the time had elapsed, remedy the defect of the feoffment in this case, in the want of the word *heirs*. The person standing seized to uses, having parted with the whole of his equitable interest in favor of the objects of the trusts, it is only the *legal estate* remaining in him or his heirs, which is not adverse to the cestui que trusts. It is on the legal estate that the statute

more especially operates, and twenty-one years possession gives that estate to the person in possession, without inquiry into his original title. The *trustees*, consistently with the trusts, might acquire against all the world, with the exception of their *cestui que trusts*, the legal title under the statute; and the cestui que trusts might acquire it in the same manner as against the trustees, as "their estate exists merely for the benefit of the cestui que trusts." The trustees cannot hold adversely to their cestui que trusts, and no time will give them a title against those for whose benefit they hold; but the reason is different in the case of those who are entitled to the equitable estates, as respects trustees, or covenantees to stand seized. The statute would not bar those who have the *equitable remainder*, because it is a part of the same estate with the equitable estate for life, or in tail; that remainder can only be barred by a common recovery, or by simple alienation under the statute of Pennsylvania.

Let us suppose that the trustees in this case had executed their trusts by express conveyance; it would have been done by giving a *legal* estate for life, or in tail to C M, or in tail to her issue, remainder to the nieces, and this would be precisely the effect of giving a legal estate to C M, under the statute of limitations, in virtue of a twenty-one years possession. Or, if acquired by the trustees as the persons in possession, it would supply the defect of the deed, and enable them to execute the trusts according to the intention. Where there is no court of equity to decree a complete execution of the trusts, the former construction of the statute ought to be favored, and is so where the cestui que trust is in possession. It is laid down in the case of Chalmondely vs. Clinton, 2 Mer. Rep., 361, "that a cestui que trust may have a substantive, independent possession, and may even disseize his trustee."* Equity will

* See Willis, 85, 171, 119, 124. 2 Esp. Rep., 446, 449.

not permit the trustee to evict the cestui que trust; and where "the trustee is bound to convey the legal estate, on an event which has happened, the conveyance will be presumed unless the *contrary appears*." This, even where there is a court of equity; but here, where there is no such court, it is conclusive. It may be true at law, that the cestui que trust is tenant at will of the trustee, but in equity, it may almost be said that the reverse of this is the case.

It may be further remarked, that the apparent discretionary power given to the trustees in the instrument under consideration, is only found in what may properly be termed *imperfect* trusts, (not executory, or imperfectly *declared*,) where the trustees take, in the first instance, a beneficial interest, coupled with the expression of a desire for the further transmission, but which they may be at liberty to disregard; or in the case of a general power, which is equivalent to the abso-

lute ownership. Strictly speaking, these can hardly be considered as trusts. But an undefined discretion given to a stranger, who takes no beneficial interest, and who can have no motive but the mere exercise of a discretion according to his will and pleasure, while he is at the same time not at liberty to defeat the trusts, is, at least, an anomaly. Here the objects of the trusts are designated, and the trusts are imperative. If this be a power of appointment, it is what is called a particular power, coming within the rule of perpetuity, where the trustees are not the *creators* of the estates under the deed, but the mere medium of conveyance, and where we must look to the original deed of trust for the estates, and not to any voluntary act of the trustees. I do not mean to speak of special trusts for the sale of estates, for the accumulation of trust funds, or for the conversion of such funds. (10)

(10) 2 Sand., 77. Coke, Lit., sec. 463, lib. 3, ch. 8, 271. b. n. 231.

If the further agency of the trustees, for any of the reasons which have been given, be placed out of view in this case, and with it those expressions which appear to give a vague and undefined discretion, founded on a *personal confidence*, then it will present a plain case *of an equitable estate tail in C M, in virtue of the words*, dying without issue, *and of equitable remainders to the nieces of the feoffor, dependent on the contingency of C M dying without issue, and her issue dying without issue.* There is first the estate for life of C M, and then in the same deed to her children, which in a will or *trust deed*, when this word or other equivalent expression, is used collectively, and not as *designatio personæ*, or descriptive of any person then in being, are words of limitation or inheritance, and not of purchase, and

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Fearn, 437. 1 Eden, 227. 2 Fonb., 94. Fearn, 563. Fearn, 246. 9 Mass. Rep., 514. Fearn, 58. 2 Vesey, 335. 7 do. 85. Sugden on Powers, 429.

according to the rule in Shelley's case, (which applies to equitable as well as to legal limitations,) the two estates unite, and form an estate tail in the first taker. If the direct limitation to the children be also placed out of view, this interpretation will be further strengthened, because C M, in virtue of the words "dying without issue," would take an estate tail by implication, or operation of law, *to effectuate the general intent in favor of the issue.* Although it is not expressly declared what kind of estate is to be given to the children, yet, inasmuch as the estate is not to go over, or from C M, or her children, excepting in the event of their dying without issue, it follows that an estate of inheritance was intended for them, and they must take an estate by *implication,* for the want of an *express* limitation; but if the children cannot take such estate by *implication* according to the rules of law, their ancestor must take for them, in order to enable them, as well as the grandchildren, to take, and

thus accomplish the general intent, which might otherwise fail. (11)

According to this view of the case, the limitations in the original deed would read as follows: *To C M for life, on her marriage and having children, remainder to the nieces of the feoffor, in fee, if C M die without issue.* Or: *To C M for life, on her marriage and having children, and to such unborn children, in tail, on their marriage; and if C M die without issue, or such children die without issue, then in fee simple to the nieces.* In either of these cases, C M would take an estate tail.

But even if the deed of trust gave sufficient power to the trustees, that is, a sufficient legal seizin to enable them to execute the equitable

(11) 3 Comyn's Dig., 398–9, 400. 4 D. and E., 294. 5 Dane's Abr., 513, 514. 1 Dallas, 47. 2 Fonb., 60. 1 Coke, 127. 11 ibid, 80. Eq. Ca. Abr., 185. 1 P. W., 75. Case in 1 Yates. 2 Yates, 374, 400, 414.

estates, in fee, and to limit them by way of strict settlement, it would be necessary in order to accomplish this, to interpose special trustees after every particular, and vested estate, in order to preserve the contingent uses, or to prevent the union of the estate for life and the inheritance; the legal estate of the general trustees being insufficient for these purposes. Perhaps the general trustees might be interpolated in the equitable line by a special clause; but nothing of the kind has been done in the deed; nor has it been, if we consider it an *executory trust*, unequivocally *directed* to be done, the only ground on which a chancellor would order it to be inserted. But if we depart from the plain legal construction which has been laid down, it will be necessary to enter the uncertain field of executory trusts, of springing uses, resulting trusts, and nearly all the abstruse and puzzling questions of the English law of tenures. Even the English judges and chancellors have sometimes found these subtilties so

excessive, that they have been obliged to break through them at once, and content themselves with decreeing a *substantial* execution of the trusts. (12)

But for the purpose of making a more complete analysis of the deed, I will consider it as if there were no defect in the conveyance of the legal fee to the trustees, and that in virtue of it, they have sufficient seizin to convey the legal estates in fee, which they are required by the deed to execute. It is proper to remark, however, that whatever discretion of a personal nature was confided to them, but not explicitly expressed in the deed, and not imperative on them, may be fairly considered as waived by the delivery of the title deeds, and the possession of the land, with written directions to the agent to account to C M and her husband. In doing

(12) Fearn., 56, note. 2 Fonb., 90. Fearn., 320. 2 Fonb., 88. 1 Eden., 87.

this they did all that was in their power to do, even if the deed were not defective. If any writings as evidence of legal title were required, and the time having arrived when they ought to have been executed, they will be presumed to have been executed, C M and her husband being in possession of the property, and in the lawful enjoyment of the rents and profits, independently of the trustees or any other person. This doctrine, as we have seen, is peculiarly favored in Pennsylvania, and in those States where there are no courts of equity, and where there is no chancellor to perform all the duties of trustees. ([13])

If the law courts of Pennsylvania could act on the distinction of trusts executed and executory,

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(13) 7 D. and E., 2, 47. 5 Dane's Abr., 251. Cowper, 23. Bul. N. P., 110. 2 D. and E., 698. 7 do. 3, 47. 8 do. 2, 122. 5 E. 138. 2 Johns. Rep., 84, 221. 3 do. 422. 1 Hen. and Mumf., 228. 1 Binney, 133. 1 Dallas, 72. 1 Serg. and Rawl, 30. 1 Binney, 91. 1 Yates, 341. do. 12. 6 Binney, 91. 12 Serg. 460, 46.

otherwise than by a greater freedom of construction, it could not escape their notice, that the deed, with respect to C M, is much more explicitly framed, in the declaration of the trusts, than it is with respect to her unborn children. On her marriage and having children, a portion of the land is to be settled on her for life; that portion is fixed by the rules of law; it is the whole, on the principle that where an estate is limited to two or more persons, and only one is capable of taking, in the first instance, that one takes all, leaving it to open as others become capable; besides, the estate for life, in virtue of the rents and profits having been previously settled on her, is a vested equitable estate which would not be divested by her marriage; the word *may*, must read *shall;* the mode of conveyance must be no other than such as the law would require for the purpose specified; and the *time* could not be deferred. So that the words *may*, settle and

assure, at such *time* and by such *mode* of conveyance, such *portions*, as the trustees may deem prudent and advisable, in point *of fact*, leave nothing to the discretion of the trustees. The *time*, her marriage, and having children, (and according to legal decisions the first event is sufficient,) is fixed by the deed, the *portion* is fixed by the rules of law, the *mode* of conveyance must follow her equitable estate; and the court who are to judge of the faithful execution of the trust, or who may be called upon to execute it in the place of the trustees, would consider it "prudent and advisable" to follow the rules of law and the general intent, where nothing explicitly and clearly appears in the deed to the contrary. If this be regarded as an *executory trust*, it is one of those in which nothing is left to be *ascertained*, at least by those who are to execute the trust; and if the particular intent, as relates to the children of C M, be *too indefinite for execution*, it

will not in the least affect the clearly ascertained intent as respects their parent. (14)

If the trustees had unlimited discretion as to the *portion* of C M, there would be nothing to prevent them from rendering it illusory, if they thought proper, and the trustees, contrary to the law of trusts, would derive a benefit; for, if the *time* were not determined, the rents and profits might remain, in the interim, undisposed of. It may be remarked, that as to the *two* events, *marriage, and* having children, they need not *both* happen; the first in order of time, according to judicial decisions, being sufficient, and the word children, in the plural, may be read in the singular. (15)

The foregoing applies to the clause, or part of

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(14) (15) 7 D. and E., 2. 2 Fonb., 47, 79. 2 Chitty's Black., 268. Fearn, 318. Doug., 431, 434. Fearn, by Powell, 38, 67, 247, 250, 430, 432, 501, 507, 563. 2 Fonb., 149. 3 Vesey, jr., 357. Doug., 753. 1 Wils., 105. Burrow, 1818. 1 Eden, 368. Amb., 376. 2 Vesey and Beam, 297. 3 Vesey, 752.

it, which relates particularly to C M; as to her children, they are to take, or there is to be allotted to them, on *their marriage*, parts of the estate already beneficially disposed of to their parent, and this by way of executory, or, as the law expresses it, springing use, to be *allotted* to them *respectively*, on such *terms* and *conditions* as the trustees may deem advisable. So far as the intention is here explicitly declared, it cannot be varied from, and therefore the *time* fixed for the allotment to be made, the *marriage* of the unborn children, violates the rule of perpetuity; but in other respects, this, considered as a limitation independent of, and unconnected with, the estate for life of C M, is entirely too vague and indefinite to be executed by the court. There is no rule for the *quantum* to be settled as marriage portions, and there is no hint as to the nature of, or necessity for *terms and conditions*. But if the estate of the children be connected with that of C M, it must be through the operation of the

rule in Shelly's case, and the consequence will be an estate tail in C M. It may be supposed that it was with a view to this operation of the rule of law, that the estate of the children, as an independent limitation, was left in this imperfect and indefinite state. If it was intended they should take by *purchase*, the limitation would have been, at least *ought* to have been, more explicit. How far an *unborn person* can take by purchase, especially in a deed, is not clear of doubt. I do not deny, however, that an unborn child *may* take as a purchaser; but I think it may be admitted on the other hand, that the presumption would be in favor of taking by inheritance, the estate which in the same deed or will *has been previously limited to the ancestor.* This is the natural course of things, as well as the legal. If this order is intended to be disregarded, the feoffor, or devisor, should leave no room for doubt, but make known his intention by express declaration, and even that declaration must

conform to the rules of law. The unavoidable effect of the children taking by inheritance, must be to give an estate tail to C M, and consequently a power to bar the remainders, whether agreeable to the intention of the feoffor or not. ([16])

The first and leading object of the feoffor, was to provide for the support of C M, during her natural life, out of the rents and profits of the whole estate, in case she remained unmarried; and if these should not prove sufficient, the trustees were authorized to mortgage them, and in this way, if necessary, sink the whole; as a power to raise by rents and profits is equivalent to a power to sell. They might therefore have sold the estate, to raise a sufficient fund for her use. But in case she married and had children, she was still to be provided for, but in a different mode, which was by surrendering the legal seizin, and conveying the legal estate. It was only in the

event of the estate not being disposed of for her support while unmarried, or of her dying without issue, and her children dying without issue, that the nieces could take, *not as the favored persons of the trust*, but on the failure of the primary intention. It is clear, that according to the general intent, an estate of inheritance was intended for her and her children, or issue, collectively. There is no doubt on this head; whatever doubt there may be, is as to the mode of accomplishing this leading design; and here it is unnecessary to repeat, that the particular intent, even if it were not obscure, must be carried into effect according to the established rules of law, or it must yield to the general intent. I think it must be clear that *substantially*, this is an estate *tail;* and I believe the strictest application of technical rules cannot vary the result. Nothing could prevent the necessary effects of such estates, but a limitation in strict settlement, by the interposition of different sets of trustees. But this would not save the limita-

tion to the unborn children, on account of the radical defect in the directions of the deed of trust, to allot their portions on *their marriage*, without the *alternative* of their attaining twenty-one years of age. The trustees have no power to add to, or alter this express declaration, according to the maxim, that what is expressed, *facit cessare tacitum.* (16)

The right to the rents and profits, is, in equity, the estate itself; therefore C M had at the very least, an estate for life; as a mere usufruct, like that of the civil law, is unknown to our law. The trustees have only the legal estate, the outward shell, while the substance belongs to her. The expressions, "if she remain unmarried," cannot be intended as a condition subsequent, and as a restraint on her marriage, for this is an event approved, and provided for; her estate

(16) (16) 1 Vesey, 234. 1 Sand., 318. Sugd. on Powers, 429. Fearn, 324-9. 2 Fonb., 72. 2 Atk., 246. Cowp., 600.

for life is not therefore to divest in the event of her marriage. It is not a contingency, but merely an event marking the progress of her estate for life to something of a higher character. It means in the event of, or *on* her marriage, the trustees are to settle and assure to her, in other words, convey their legal, to her equitable estate, and thus surrender the land to her own disposal and management. Such was the *practical* understanding of the trustees, who pursued this course immediately on her marriage, with the exception of the legal conveyance. The words *settle and assure* have a definite legal meaning; they would not be satisfied by a mere tenancy at will; they refer to some estate known to the law, for life, or in fee, or perhaps for years, but in the present case it could not be less than for life. ([17])

The conveyance of the trustees, whether actu-

(17) Cornish on Uses, 13. Burrow, 1818. 2 Sand., 25.

ally made or presumed to have been made, according to the principle of equity which considers things as done which ought to have been done, must by *relation* form a part of the original deed of trust, as if it had been inserted in it, and be read as part of it; for although her seizin must be served out of the seizin of the trustees, she cannot take as purchaser from them, but from the feoffor under the original deed; it is for the trustees to execute the trusts, but they cannot *create* them. A deed by them to C M for life, without going any farther, would still be read in connection with the deed of trust as a part of it, and would still be a deed to her for life, "and if she die without issue," then over; or to her for life, and to her *unborn* children in tail, words which would give to C M an estate tail in the whole as the first taker. The doctrine of relation is one of the most important to be considered in this case. It originates principally from the fear of perpetuity, which "the law abhors."

If the trustees could be the creators of the estates, instead of the mere "conduit pipes," to use a phrase applied to them, the devisor or feoffor might direct the course of transmission forever. The cases of a *general* power, or where the first taker has such an estate as to enable him to unshackle it, are not exceptions, for they have power to do as they please with it; and the only mode in which the *limitation to the children* can be saved under the present deed, would be to give such an estate to C M as may enable her to bar the remainders; that is, if there were not inherent defects in such limitation. ([18])

As the doctrine of relation is very clearly laid down by an elementary writer of high authority, I will make some extracts from his work.

"By *general* powers, we understand a right to

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(18) Sugden on Powers, 429. Cornish on Uses, 111. 2 Sand., 75.

appoint to whomsoever the donee pleases. By a particular power, it is meant that he is restricted to some objects designated in the deed creating the power, as to his own children. In the *first* of these cases, he has an absolute disposing power over the estate, and may bring it into market whenever his necessities or wishes may lead him to do so. The period for the commencement of the limitations, [in the case of a *general* power,] in *point of perpetuity*, is the time of the execution of the power, and not the *creation* of it. Thus, if A were to convey to his unborn son for life, remainder to the sons of that son as purchasers, the remainder to the children of the son would be void, as tending to a perpetuity. But if A were to convey his estate to such uses *generally* as he might appoint, &c., it would be otherwise."

"With respect to *particular* powers, they have a tendency to perpetuity, which is not obviated

by their enabling the donee to limit the fee. For the question in these cases, is not whether the donee can limit a fee, but whether he can, through the medium of his power, dispose of the estate as if he were seized of it in fee. It is well established therefore, that under a particular power, as a power to appoint to children, no estate can be created, *which would not be valid if limited in the deed creating the power.* The test of the validity of the estates raised, is to place them, in the deed creating the power, in lieu of the power itself. Thus, if by a settlement an estate be limited to A for life, remainder to his children as he shall appoint, and he afterwards appoints to a son born subsequently to the settlement for life, remainder to the children of that son as purchasers, read the limitations as if inserted in the settlement, in the place of the power, and they will read thus: To A for life, remainder to his *unborn* son for life, remainder to the sons of that son as purchasers. Now, the limitation to the grand-

children would have been void if contained in the settlement, and therefore cannot be sustained as a due execution of the power."

The reason is given in the subsequent paragraph.—"It is a possibility upon a possibility, which the law will not endure. Lord Kenyon said it was clearly settled, that an estate for life may be limited to unborn issue, provided the devisor *does not go farther*, and give an estate in succession to the children of such unborn son; by which he meant that the *children could not take as purchasers.** This is proved by an observation which he made in another case. He said, that an unborn child may be tenant in tail, but not tenant for life, with a limitation to his children as purchasers." And it is distinctly laid down in the reasons for the respondent, in the Duke of Marlborough's case, that if after the first vested

* That is, the children of the son, or grandchildren.

estate of freehold, you limit a contingent estate, or use for life, to a person unborn, then follow it with contingent remainders in tail, to the sons or children of such unborn tenant for life, such contingent limitations of the inheritance will be void; and we learn from Lord Kenyon, that this doctrine was afterwards recognized by the learned chief who delivered the opinion of the Judges on the case in the House of Lords. Indeed a limitation like this is clearly void, by reason of its tendency to a perpetuity, independently of the technical objection of its being a possibility upon a possibility, which probably means the same thing."

The principle is laid down in Butler's note to Fearn, as admitting of no question, "that in no case can an estate be settled on an unborn person for life, so as to confer an estate by purchase on that person's issue." The consequence is self evident. As the grandchild cannot take by pur-

chase, it must either not take at all, or take by inheritance; but in order to this, the immediate ancestor, or the more remote, must take an estate of inheritance in order to transmit the estate; therefore C M, or her unborn children, must take at least an estate tail, in order to transmit it to the grandchildren. That these are to take the estate, according to the deed, appears from the expression, "if the children of C M die without issue," then over. But without giving to C M, or her children, an estate tail, according to the rules of law it cannot be transmitted to the grandchildren, who cannot take by purchase, and of course only by inheritance from their ancestor. ([19])

Before I proceed to a further examination of this part of the deed of trust, I will lay down another principle, which must be taken in connection with the foregoing.

Although an unborn grandchild cannot take

by purchase, an unborn child may; but in this case, an estate must be *expressly* limited, for an unborn person cannot take by *implication*. Whatever subtle reasons may have given rise to this rule, it is not the less clearly established. The doctrine as laid down by Foublanque is not questioned. "It seems clear that the *issue*, [the unborn children of the first taker,] could not take by *implication*. But if the issue cannot take as purchasers, they can only take by the estate being *transmissible*, for which purpose the ancestor must take a descendable estate, and in thus making the *particular intent* give way to the manifest *general intent*, courts of justice do no more than the testator himself would probably have done had he been apprised *that his general purpose required him to give up his particular intent*." ([20])

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(19) (20) Fearn, 363, Butler's edit., note. Cornish on Uses, Law lib., 111. 2 Sand., 77. 2 Fonb., 60.

To apply these principles more closely to the deed under consideration, there is first the estate for life of C M, with the limitation over on "her dying without issue," which, if we stop here, is one of the most common cases of implied estate tail, where the estate for life is enlarged by implication for the benefit of the issue. But *parts* of the same land are to be allotted to her children, at the discretion of the trustees, on such terms and conditions as they may deem advisable, and if they die without issue, then over. Now, it is plain that no estate is expressly limited in the deed of trust to the children of C M, and according to the doctrine of relation, this cannot be done by the trustees without being the *creators* of such estates, which they cannot be. There is not even an estate for life; if they were *persons living at the time* of making the deed, an estate for life might be implied, and that estate might be enlarged by implication to an estate tail, for the benefit of the issue of the children; but an

unborn child cannot take by *implication.** It appears to be the intention that the issue of the children shall take, and they can *only* take by inheritance; yet they cannot take from the children of C M, for they have neither an express estate, nor can they take an estate tail by implication in order to transmit the estate; C M has both an express estate for life, and *can* take by implication, not only for her children, but her grandchildren; therefore she must take an estate tail, otherwise the clear general intent will be defeated. In addition to this, it must be recollected that the allotment to the children is to take place on their *marriage*, without the alternative of their marriage, *or* attaining twenty-one years, which violates the rule of perpetuity, and is a possibility on a possibility; for it depends upon all these contingencies, the marriage of C M, the birth of children, and their marriage. So that the view I have taken of the limitation to the

* Or unborn grandchild, by *purchase*.

children, is supported by reasoning which approaches as near demonstration as a subject not purely mathematical will permit.

As the grandchildren cannot take unless either C M or her children take an estate tail, the whole question to be determined is, whether C M, *or* her children, must take such estate under the deed of trust. What has been said is perfectly conclusive on this head. The case is narrowed down to this single question: Does C M take the estate tail, or is it to be *postponed* so that her unborn children may take it?* The children *cannot* take it, and C M *may*, and *does* take according to the rules of law. It would be difficult to assign any reason, why the feoffor should give an estate of inheritance to the unborn children of C M, and only an estate for life to her, for whom,

* Could the trustees on an appeal to equity, *withhold* an estate tail from C M or her children? If it be admitted that they could not, the *general intent* of the feoffor is established.

as the immediate object of the feoffment, and for whose support, before her marriage, the whole estate might have been sunk! But if C M and her children take independent limitations, as purchasers of different parts of the land, then each must have an estate tail of the respective portions, in virtue of the words, "dying without issue;" so that in any event C M must take an estate tail of her portion, and that portion in the first instance is the *whole*, liable to be divested in part by the future contingent springing uses of the children, which like other contingent estates are liable to be defeated before they do vest. The moment, however, we depart from the plain principles of law, that there is but *one estate*, and *one inheritance*, beginning with the first taker, there seems to be, at least in the present case, nothing but a confusion of ideas.

The children cannot take *less* than an estate tail in order to transmit it to their children. If

they take as *purchasers*, under the deed, this is the very *least* they can take. There would thus be two distinct sources of inheritance, that of C M, of the portion remaining to her, and that of the parts allotted to the children. But this is not contemplated by the deed; for in both cases the remainder over, *is not of these distinct parts, or portions, but of the whole*, which shows that the inheritance was to be preserved entire.

The children cannot take both by limitation and by purchase, through the allotment of the trustees. If through the latter, many questions would arise. If C M die, leaving issue, there is no direction for the receipt and disposition of the rents previous to the marriage of the issue. If the estate of C M be only an estate for life, if any of her children marry and receive their portions in her life time, and C M should afterwards die, the portion retained by her would not go to her children, because they could not inherit, as

she had a mere life estate, and because their portions had already been assigned; and it could not go to the nieces, because the contingency on which they are to take would not have happened. There is no provision for the reannexation of the marriage portions of C M, should she survive her children, and their husbands. These are all possible occurrences; but the most natural contingency, and one which ought to be provided for, is the death of C M, leaving issue unmarried. If they took by *inheritance*, their estate would vest immediately on the decease of their parent, and they would be entitled to the rents and profits for their support; but if by *purchase* they could take nothing until their marriage; and in the meantime, there is no direction to receive the rents, and apply them to their support and education, or place them to accumulate for their benefit. In this view of the case, many difficulties naturally suggested themselves, which would be avoided by giving a transmissible estate, in order

to secure all the benefits of the trust. It is true this would afford an opportunity of barring the remainders; but it was observed by an English chancellor, in a case of executory trust, that this was no objection, as the court would not look beyond the immediate object of the settlement.

It is said that in a deed the word *issue* is always a word of purchase, and not of limitation. This is true only of deeds which operate by way of *conveyance*, or at common law, not in a trust deed, either executory or executed, which are construed like wills; although there is this difference, that an executory devise needs no particular estate, or preceding *vested* estate to support it, which is not the case with a contingent remainder in a trust, or a contingent springing use. In these cases there must be an estate ready to vest at the termination of the preceding vested estate, so as to keep up the chain of equitable limitations unbroken, in imitation of legal es-

tates; for if a single link should be wanting, the estate must be a resulting trust to the original feoffor, and all the contingent limitations will fall to the ground. The question which again recurs, is, whether the estate tail be taken by C M, or by her children; and this is settled at once, by the terms of the limitation to the latter, *on their marriage*, which violates the rule of perpetuity, and would be void, even as an executory devise. The estates of the children must *necessarily* vest immediately on the termination of the estate for life, but according to the deed, they *may not* be ready to vest on the happening of that event, unless they take by inheritance. ([21])

It is a rule, familiar to every lawyer, that, *by no contrivance*, can the alienation of estates be restrained for a longer period than a life, or lives,

(21) 1 Prest., 386. 2 Fonb., 90, 19.

in being, and twenty-one years and some months afterwards, allowing for the birth and coming of age of a child. According to Fearn, if this period *may* be exceeded, it renders the limitation depending on it void. The very case is stated by him of an estate to an unborn child, on its *marriage*, which is both objectionable on the score of its being a possibility on a possibility, and because it *may* occasion the period to be extended beyond the legal time. He gives it as his opinion, however, that if the words were in the *alternative*, "on the marriage of such unborn child, *or*, on its attaining twenty-one years of age," it would be valid. In the present case there is no such alternative, the estates of the unborn children of C M are to be settled on their *marriage*, which might prolong the time to fifty years after the death of the tenant for life. The law, it is said, "abhors a perpetuity;" it is certainly as abhorrent to our institutions as to those of England. If it were tolerated, the actual ownership of land might

be kept in suspense for an undefined period, rendering it of little or no present value to any one. Improved estates, thus tied up, at least in this country, are almost certain to go to decay, and unimproved lands to remain unimproved; in both instances incompatible with the general prosperity. (22)

If the limitation to the children, as has been shown, is radically defective, because no estate is expressly limited in the deed, either for life, or in fee tail, where nothing short of the latter can accomplish the general intent of the feoffor, it is equally faulty on account of the rule of perpetuity. Even if an estate tail had been expressly limited, the period appointed for it to vest would render it void. It is possible that there may be a faulty construction of the clause of limitations to C M,

(22) Cornish on Uses, 3 vol. Law lib., 111. Fearn, 329, 430, 432, 511, 563. 2 Fonb., 95. 12 Mod., 287. 1 Vernon, 164. 2 Sand., 78. 5 Bacon, Uses and Trusts. 1 Sand., 318. Fearn, 329.

and her children, which may be rendered more clear by a different grammatical arrangement of the words, or members of sentences, omitting some words, and adding others, thus: "But if she marry, that they may settle and assure to her, such portion of the land, &c.; *and if she have children*, they may allot to them respectively *on their marriage*," &c. The only difference which this can make is to cause the estate to vest at once on her marriage, without waiting for the birth of children, which would be supplied by the rules of law, as we have already seen. It would leave the limitation to the children in the same imperfect state. C M, then, takes at once an estate tail in the whole of the land, subject to the contingent springing uses to her unborn children on their marriage. But the deed furnishes no rule, as has been said, as to the quantum to be assigned as marriage portions, nor does the law furnish it for the guidance of the court; and if the children can take by *purchase*, it must be

from the feoffor, and not from the trustees. If this allotment had been left to the parent, she might have exercised her will and pleasure; but a mere stranger, or the court, must have some other guide, for the reasons already given, and which need not be repeated. It appears from the deed itself, that this was not to be exclusively left to the trustees, as the court is ultimately to judge of its proper or improper execution. It is clear that neither the *quantum* nor the *quality*, or nature of the estate, can depend on the allotment of the trustees; the settlement on this plan is legally impossible, as all the estates must be determined by the original deed; and an estate to the children on their marriage, and the direction to the trustees to *allot* to them on their marriage, is one and the same thing

The expressions, "by such *mode* of conveyance as they may deem prudent and advisable," in relation to C M, and the words, "on such

terms and conditions," as applied to the children, although not descriptive of any particular kind of estate, would seem to leave this to be determined by the trustees. If such be the intention, it is at variance with the rules of law, because it would be to enable them to *create* the estates. But they only open a door to *conjecture*, and the court will not act on *conjecture;* they will endeavor to collect the intention from the general object and scope of the deed, and not from private instructions independent of it, or from a supposed possible meaning. It is very possible the feoffor had some contingency in view, when it might be proper to retain a hold on the estate; yet, the *contrary* must also have been in his mind; and it is certain, that he has not directed *positively* what the trustees are to do. What they might, or *might not* do, is a matter of conjecture; whether they might deem it advisable or not, to exercise this undefined power, *would depend on circumstances.* But the court,

in such a case, could not act in their stead, nor judge of their acts; and the estates must receive their legal character at once from the deed, and not be any thing or nothing, according to future events. What the estate is, must be defined at once, although it may depend upon a contingency whether it shall ever vest, or be enjoyed by the person for whom it is intended. If the conjectured meaning of the foregoing expressions be set aside, the limitations must have their legal course; they must be determined by legal rules, and these clearly make it an estate tail in C M.

To the same mistaken view of the power of the trustees to *create* the trusts may be referred the last clause, which declares that "neither C M, nor any husband she may have, shall have any right, title, or *interest* in the land, either in law or *equity*, without an express grant in writing from the trustees." In a *will*, it might be a ques-

tion, whether this portion of the clause has not done away or revoked the equitable estates previously limited; but in a deed, where there are repugnant clauses, the first prevails over the last, the reverse of that in the construction of a will. Besides, the equitable and legal estates seem to be confounded; if the trustees are the depositories of both, they are the absolute owners. But the succeeding part of the clause reconciles the whole to the general tenor of the deed; it is not "to be understood as precluding legal remedies to compel a proper execution of the trusts, if this should be refused or neglected." What execution? Surely not the *voluntary* act of a grant in writing, but the fulfilment of the trusts according to the previous declaration. If the words, *grant in writing*, have any legal signification, they mean nothing more than a legal conveyance, and such conveyance may be *presumed*, C M being in possession, and the time having arrived for making it. If, instead of the expression "grant in

writing," the word *deed* had been used, a legal signification might have been attached to it; but the court could not undertake to say what kind of writing would be necessary to satisfy the words which are used. ([23])

After all, it is most likely that there is no *particular intent*, to be made out from the foregoing ambiguous expressions—that they are not intended to be operative, or to have any legal effect; and this is much more probable than the supposition of a want of skill in the person who drew the instrument. They may have been adopted from the practice not unusual in England, of inserting clauses *in terrorem*, or where the future directions are to parents, to ensure the respect of their children, as such clauses give an appearance of dependence. If this be correct, the trustees, in merely *delivering the possession of the estate and the title deeds*, may be considered as having performed all that could be expected from

them; and the other particulars, such as the "mode of conveyance," the "terms and conditions," upon which they were not *compelled* to act, may be regarded as purposely waived, leaving the limitations to be determined by the deed, and the rules of law, uninfluenced by any act of theirs, which they might do, or refrain from doing. ([23])

I am thus led to the conclusion that C M takes an equitable estate tail; and further, from her possession, and the time having passed for conveying the legal estate, she may be considered in law as the legal, as well as the equitable owner. If it be contended that this is an executory trust, and that the trustees or the court would have power to model the estate, and by a strict settlement, and the interposition of special trustees, prevent her from barring the remainders, it is

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(23) (23) 2 Sand., 25—(word *grant.*) 2 Black. Com., 381.

answered, that it is not merely because it is an executory trust that this would be done, according to the decisions of English chancellors, but because it is *expressly* required to be done by the feoffor; as where it is expressed in these words, "the said estate tail is to be limited in such a manner as to prevent the tenant in tail from barring the remainders," or where there is a necessary implication; and where this is not the case, the limitation must take its legal course. Such a technical, artificial settlement, cannot be effected without a court of equity, and it is not clear that under an act of Assembly, *any contrivance* would effect an object so little consonant with our policy and laws. But if it were so, it would be useless; because the remainder to the children of C M, to be preserved, is legally void, for the want of an express limitation to them, and from its tendency to perpetuity. But according to the act of Assembly, every remainder after an estate tail may be barred, and C M can

take nothing short of such estate, in order to transmit it to her issue and their issue.

The foregoing construction of the deed under consideration, and argument in support of that construction, may be summed up in the following manner :—

1. C M takes a vested equitable estate for life in the first part of the deed, in virtue of the rents and profits being set apart for her support during her natural life.

2. This estate for life is not divested by her marriage, which cannot be regarded as a condition subsequent, but merely an event to mark the time when the trustees are to convey the legal estate, and deliver to her a portion of the land.

3. That portion must in the first instance be

the *whole,* because she is the only person *in esse,* capable of taking, and because she has already an equitable estate for life in the *whole.* The trustees have no discretionary power in delaying the settlement, and it cannot be prejudiced by their neglect, because the time or period is fixed (the marriage of C M) by the deed. The words *settle* and *assure,* refer to some legal estate known to the law, which, in the present case, cannot be *less* than an estate for life.

4. The estate thus settled, must, by *relation,* form a part of the original deed, and be read as if inserted in it, in connection with other clauses. It will therefore be to C M for life, and if she die without issue, to the nieces of the feoffor, which, according to legal construction, is an estate tail by implication, or operation of law.

5. The limitation to the unborn children of C

M cannot take effect by way of purchase, because no estate is expressly limited to them, and the trustees cannot create the estates, but only execute them; and again, if an estate tail had been expressly limited, it tends to perpetuity, because it is not to vest until the marriage of the unborn children, instead of twenty-one years of age, the period allowed by law; and this time (a life in being, and twenty-one years) must run from the date of the original deed, and not from the execution by the trustees.

6. As it appears from the general intent, that the children and grandchildren of C M are to take the estate, and neither can take as purchasers, they must take by inheritance, and C M must take a transmissible estate for this purpose, which is an estate tail.

7. That if this be considered an *executory trust*, and by a technical settlement of the estate,

and the interposition of trustees to preserve contingent remainders, the court could prevent the barring the estate tail, it would not interpose, without the *express* declaration of the feoffor that such was his desire. But in this State the court possesses no power to direct the conveyance of estates in strict settlement, even if expressly required; it must therefore be done by the party himself as his own conveyancer, or the technical rules must govern.

8. As the limitation to the children of C M is void by way of purchase, the deed must be construed as to C M for life, and if she die without issue, and that issue die without issue, then over, which might be carried out *ad infinitum*, and cannot mean any thing less than an indefinite failure of issue. Such must be the construction of the court, unless they can make the children of C M a distinct root, or commencement of an

inheritance, instead of commencing the inheritance with C M herself.

A feoffment of the anomalous character of that which has thus been examined, can only be *substantially* carried into effect. Certainly the courts of Pennsylvania, with their limited equity powers, would not undertake by subtle contrivances, even if not contrary to the general policy of our laws, to effectuate a particular intent, not even expressed, but left to conjecture. And this attempt by means of trustees to retain a *post mortem* power over property, or after having parted with it, must fail. It is in fact an attempt to create a perpetuity by a new contrivance, but too palpable to be mistaken. If successful, it might, for an indefinite period, render a valuable property of little, or nor use to any one. Either C M is the owner of the property, or the trustees are the owners; and the latter cannot be; if the

equitable owner, she must take some estate known to the law, and not an undefined interest, which may be any thing or nothing, according to circumstances which are not even specified. That is, it *cannot* be an estate for life, or in fee, according to the pleasure or caprice of the trustees; and we must look for the nature of that estate to the deed of trust, as any legal conveyance made under it must, by relation, form a part of it. To give effect to this clear general intent, nothing short of an estate tail will suffice; and as there is nothing in the deed to the contrary, express or implied, and as the law annexes the usual incidents of such estates—it is subject to tenancy by the curtesy, liable to be barred under the act of Assembly, and subject to debts, according to the decisions of the courts of Pennsylvania.

In the foregoing, for the sake of conciseness and clearness, I have only invoked those princi-

ples of law which I deemed absolutely necessary for the decision of the case before me. But the subject admits further illustration, or explanation, in detail; especially on some topics which lie somewhat out of the ordinary routine of the profession in Pennsylvania.

AN ESSAY

ON

TRUSTS AND TRUSTEES, &c.

PART II.

We will now consider the subject under the following heads:

1. The discretionary power of trustees, under trusts, or powers of appointment.

2. The doctrine of trusts *executed*, and executory.

3. The analogy between legal and equitable estates.

4. Estates tail by implication, or operation of law.

1. The trust must be of such a nature as to be susceptible of the control of the court, so that

its administration may be revised, and in case of mal-administration be reformed, and a due administration directed; or, if refused or neglected, the court is to execute it in the place of the trustee; for a trust cannot fail, for the want of trustees, where there is an *object* to be benefited, and a *subject* for the trust to act upon. (1)

The trustees can neither derive a benefit from the trust, nor confer one; they are the mere instruments appointed for its execution; their acts form, by relation, a part of the deed by which they are themselves constituted; they must look to it for their directions; and they cannot, out of their own will and pleasure, do what is not therein directed to be done, or do it differently from the way in which it is directed. A vague and undefined discretion could not be regarded by

(1) 2 Fonb., 36–7, 146. 10 Vesey, 539. 3 Vesey, 127. 8 Vesey, 573. 1 Eden, 227. Fearn, 74. Sugden on Powers, 392. 1 Sand., 349. Willis on Trusts.

the court, who might be called on to act in their place, and who would look no farther than the declared general intent, if the deed itself furnished no clear directions as to any thing beyond it. In the present case, the general intent, which is to give to C M and her issue, collectively, an estate of inheritance, is sufficiently clear; but with respect to any contingencies on which the trustees may exercise a discretion, the deed is silent—at least furnishes no directions. If the deed be taken literally, it is either at variance with the general object or intent, or it confers power to exercise a discretion, without any rule but the mere pleasure of the trustees; according to which a court could not administer the trust, or reform, or correct the improper administration of it, by the trustees. (2)

No cases can be produced, where the discretion of trustees has gone *to the extent of defeating the trusts*, excepting in those where they

took, at the same time, such a beneficial interest as to enable them to do what they pleased with the estate. As if, for instance, the estate had been settled on C M, with a discretionary power of appointment to her own children. Even in case of a beneficial interest, with a trust annexed, it is laid down "that if the creator of the trust shows his desire that a thing shall be done, unless there are plain express words, or necessary implication, that he does not mean to take away the discretion, but instead to leave it *to be defeated*, the party shall be considered as acting under a trust." (3)

As in the case considered, the trustees are *strangers*, and the mere medium of conveyance, it is evident that from the nature of their office,

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(2) (3) 17 Vesey, 255. 18 Vesey, 476. 7 Vesey, 83. 19 Vesey, 299. 2 Vesey, 325. 1 Eden, 227. Fearn, 74. See Cornish, Uses. Eden, 404. 3 Atk., 22. 16 Vesey, jun., 308. 1 Black., 428. Amb., 479. Fearn, 563. 2 Sand., 78. 12 Modern, 287. 1 Vern., 164.

they can no more exercise a discretion whose only rule is their own will and pleasure, than could the chancellor whose duty it might be to act in their place, or review their administration. This is in fact placed beyond all doubt, by the declaration of the feoffor, that nothing contained in the deed is to preclude C M from having recourse to legal remedies to compel a proper execution of the trusts. It also establishes the position independently of legal authority, that the trusts are *created by the deed,* and not to be created by the trustees, otherwise this right to apply to the courts for legal remedy would be a solecism—a mere contradiction of language. There is no such thing as an equitable right to an equitable right, or a trust to *create* a trust estate; although there may be directions in the trust deed to convey in *trust* an estate already determined, and this for special purposes, as for the benefit of a femme covert, &c. But the deed contains no special directions. If C M has

any thing, therefore, it is in virtue of the deed itself, and not from any subsequent *voluntary* act of the trustees. The trustees are the depositories of the *legal* estate, for the benefit of those who are entitled to the equitable interest, and it becomes their duty to convey the legal estate, whenever the time shall arrive when it may be proper for them to do so. Suppose the trustees refuse to accept the trust, and, in consequence, its execution is devolved on the court; of what effect would be the clause giving a discretion to the trustees, which they alone could exercise, if it is to be determined by their will and pleasure? The court must either reject the clause, or declare that it is no trust at all. (4)

If the deed be regarded as a power, in the nature of a trust, it is not revocable, either expressly or impliedly, by the maker, as in the case of a mere *letter of attorney,* from which it differs in respect of the important doctrine of relation.

The act of the *attorney* is the act of the principal, as if he were personally present, and as such, dates from its execution, and not from the date of the letter. The distinction of general and particular powers has been fully explained. (5)

If the trustees could exercise a power beyond the deed, and create the equitable estates, they could do every thing which the owner himself could do, in case he had never parted with his estate; that is, dispose of it, or withhold, according to their mere whim or caprice, which would render the deed a mere nullity, as respects the equitable estates. Such a power cannot be transferred, without at the same time transferring the complete ownership, both equi-

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(4) (5) 3 Vesey, 752. 9 Vesey, 323. 10 Vesey, 535. 1 B. C. C., 143. 2 ibid. 38. 8 Vesey, 574. 12 Vesey, 234. 2 Vesey and Beam, 297. 1 Atk., 469. 2 Vesey, 335. 7 Vesey, 85. 18 Vesey, jun., 41. Cowper, 116. Sugden on Powers, 204.

table and legal. This is not the case of jointuring, or settling marriage portions, where the future directions are to the person taking the beneficial interest in the first instance: a power is attempted to be given to mere strangers, which they cannot be permitted to exercise at their entire discretion, without also allowing them to defeat the trusts altogether, if they should think proper to do so. The deed must be the guide of the court, and no other, where it is evident that it was not intended by the feoffor to leave the trusts to be defeated, at the option of the trustees; and that instrument must be construed and administered by the court, according to the rules of law.

The trustees have no discretion as to the settling an estate on C M, on her marriage. The time being fixed by the deed, the portion determined by law, the mode of conveyance must follow, and must conform to what is thus rendered

certain. The word *may* must read *shall.* Where a thing is positively required to be done, and clearly intended, the form of expression will not be regarded; and even, in such case, *precatory* words are construed to be *imperative* in their meaning. When the feoffor used the word *may*, it is very clear he did not mean to say, the trustees may *not* settle and assure; or he would not have expressly declared that C M might have recourse to legal remedies to *compel* the proper execution of the trusts. It is, therefore, as to this part at least, a trust *executed*, or fully declared, and not an executory trust.

2. With respect to the doctrine of trusts executed and *executory*, if it can be recognized at all in Pennsylvania, further than as authorizing a more liberal interpretation in favor of the intention, it must necessarily be different from what it is in England. In the first place, because we have no court of chancery, to give practical effect

to this kind of trust, by directing an artificial settlement in minute detail, at least to the same extent as in that country; and in the next place, because the limitations of estates in strict settlement beyond the lives of persons in being, which is their principal object, is not favored by our laws or judicial decisions. Our act of Assembly facilitating the barring of entails, is itself a great innovation on the English system. Chief Justice McKean declared, that the rule in Shelly's case, which enlarges the estate for life to an estate in fee tail, is particularly favored in Pennsylvania; and he observes, that "however astute the English judges may be, in dividing the estate for life from the inheritance, where they are both to be found in the same deed, such an astutia would ill comport with our free institutions." Chief Justice Shippen declared, that the policy of our laws on this head was more liberal than that of the neighboring States, which was, of course, more so than that of England. He uses the

following language: "Our ancestors of Pennsylvania seem very early to have entered into the spirit of commerce, by rejecting every feudal principle which opposed the alienation of lands. While in almost every province around us, the men of wealth were possessing themselves of large manors, and procuring laws to transmit them to their oldest sons, the people of Pennsylvania gave their conduct and laws a more republican cast."

Executory trusts occur in wills, or in marriage articles, and I have not met with a single case in a formal deed of feoffment, where the party *has undertaken to be his own conveyancer*, as in the present instance. For, the intention of leaving the declaration of trust in this imperfect state, is to resort afterwards to the technical skill of the conveyancer; the original writing, whether a marriage contract, or a will, being the guide as to the matter to be settled in legal form. It is

in such preliminary instruments, that the *nature* of the estates to be settled, and the *terms* and *conditions* are expressed, but not in technical language or with technical astutia. The estates are not to be *created* by the trustees, unless they are at the same time the owners, in virtue of a general power. The doctrine of relation applies to executory trusts, as well as to trusts executed; and in the legal or technical settlement, those to whom the future directions are given, must follow the substance of these directions, substituting the technical phraseology of the law for the common language. The nature of the estate to be *executed,* must therefore be announced in the executory trust; it cannot be left to the future determination of the trustees; otherwise, they may be the creators of the estate, which would enable them to disregard the rule of perpetuity. To give a plain example, we will suppose that A, the trustee, is required by the executory writing *to convey the estate to B for life, and to settle the*

same on the first, second, third, or fourth unborn child of B in tail, but in such a manner as to prevent B, or any of his unborn children in succession, from barring the remainder to the first, second, third, or fourth child. Here the technical skill of the conveyancer, and the astutia of the court, would be required to settle the estate in a legal manner, in conformity with the foregoing declared intention, so as to prevent the tenants of the preceding estates from barring the remainders; and this is done by interposing different sets of trustees at the termination of each estate; that is, if it can be done at all here, since our act of Assembly. In consequence of this *express* direction alone, would the court undertake to interpose special trustees, for the purpose of preventing the barring of the remainders, and which could only be done by an instrument drawn with technical astutia. But if the executory trust, whether in a deed or in a will, contained no such *express* direction, the law would be suffered to take its

course; and as, from the strict analogy between equitable and legal limitations, it is equally necessary to interpose special trustees, the general trustees having only a legal estate, the equitable estate for life would unite with the inheritance, constituting, according to the rule in Shelly's case, which applies to equitable, as well as legal estates, a barrable estate tail. In the deed under consideration, the party has been his own conveyancer; but if it be considered an executory trust, he has not *expressly* directed a settlement to be made, in such manner as to prevent the remainders from being barred; the legal estate continues in an unbroken line, and so does the equitable. There are no directions for a further settlement, with the express view of preventing C M, or her children, from barring the remainders. All that can be drawn from the deed is a vague conjecture that this was left to the option of the trustees, either to do or not to do, as they saw fit. But this is mere conjecture, from the

words, "such mode of conveyance," applied to C M, and the words, "such terms and conditions," as applied to the children. These expressions are entirely too indefinite for a court to act upon.

The doctrine of executory trusts is very far from being a clear and satisfactory one, in the English law. Notwithstanding the elaborate arguments of Fearn and Fonblanque in favor of it, they have by no means succeeded in placing it on a firm foundation. So far as the power assumed by the courts of modelling trusts, and of acting as the conveyancer of the maker of the trust goes, it appears to me to border on the exercise of an arbitrary and undefined power, more safely let alone than acted on. It is admitted by Fearn, that under this assumed power, chancellors have taken liberties with instruments of writing, "not of the gentlest touch," which is itself a sufficient cause to revolt our minds against such a doctrine.

If the party desires by a technical contrivance and astutia, to prevent the operation of the ordinary rules of law, which are supposed to be founded on justice and wisdom, let him do so as his own conveyancer, without calling in the aid of the astutia of the court; and let not the court snatch a questionable power, to accomplish that which is at variance with public policy and the spirit of the laws—to wit: the throwing difficulties in the way of the alienation of lands. The result of my researches is, that one of the main objects of this doctrine was to counteract the operation of the rule in Shelly's case, which had the effect to divide and diminish the wealth and the landed estates of the great aristocratic families, and tended to advance the commercial and manufacturing interests. The alleged inconsistencies of Lord Hardwicke, in the cases of Spencer and Bagshaw, and Garth vs. Baldwin, may be ascribed to the nature of the doctrine itself, being then comparatively new. In the first of these cases, he

declared, that there was no difference between trusts executed, that is fully declared, and trusts *executory*, or imperfectly declared; that they were both more or less executory, and both must conform to the rules of law, and the intention of the maker of the trusts. Mansfield appears also to have disliked this loose distinction, which threatened to cut adrift the firmly anchored law of tenures. Fearn has placed no permanent landmarks; he admits that in *all trusts* something yet remains to be done—in those that are executory, or imperfectly declared, to declare them in a more perfect manner; in those that are *executed*, or perfectly declared, to clothe them in legal form. (6)

There is no uniform and satisfactory definition of an executory trust, by which it may be distinguished from a trust executed. It has been de-

(6) Collect. Jurid. 2 Vesey, sen., 446. Fearn, 130. 1 Fonb., 137, 404.

scribed to be, where the words "to settle and convey" are used; but these words do not distinguish those trusts which are fully declared, and where nothing remains to be done by the trustee but to convey the legal estates to the equitable estates, explicitly and formally declared. In the case of Henly vs. Austin, the Lord Keeper observed: "With respect to trusts *declared*, the rule is the same, but in case of *imperfect* trusts, left to be modelled by the trustees," &c. All trusts are *imperfect*, compared to legal estates. I have applied the term *imperfect*, I think with more propriety, to those cases where the trustee has power to *defeat* the trusts. In another case, an executory trust was said to be, "where something is left to be done in a more perfect manner by the trustees in the first instance, and secondarily by the court." In Leonard vs. Stanly, the Lord Keeper declared, "that the distinction had not been well expressed." In Taylor vs. Austin, the chancellor said, that "the words executory

trust had no fixed meaning whatever." In Rosseau vs. Read, no better definition is given. In the cases just cited, in that of Pearson vs. Wright, in that of the Duke of Newcastle, different definitions are given, and equally unsatisfactory. All that can be gathered from them, is, that the chancellor, having previously determined in his mind in the particular case that it is an executory trust, proceeds to model it according to the intention to be gathered from the instrument, and as nearly as may be in conformity to the rules of law and equity. In one of the cases cited, it was said to be, "where something is left to the judgment of trustees, and *consequently* of the court, which is to perform the part of counsel." In the case of the Duke of Newcastle, it is placed on much narrower ground; it is said, "where the person declaring the trust takes upon himself *to be his own conveyancer*, the court will not presume to model the trust, and direct a conveyance in such a manner as to affect the

intention, but permit the legal construction to prevail." Preston lays it down, that the mere circumstance of a conveyance being directed to be made, will not of itself be sufficient to make the trust executory, so as to authorize the court to model the trust. (7)

Notwithstanding the power assumed by the court of equity in England in executory trusts, it is uniformly conceded, that effect must be given to the established rules of law and equity, unless precluded by the express declaration, or necessary implication of the maker of the trust. As where he expressly declares his desire that the estate shall be settled in such a manner as to prevent the tenant for life from barring the remainders, or where he uses expressions entirely incompatible with an estate tail. In both these cases, it is a necessary presumption, that as he meant that the

(7) 1 Eden, 364 2 Eden, 6. 1 Eden, 368, 195. 12 Vesey, 230. 1 Eden, 87. 2 Vesey, sen., 464. Prest., 386.

first taker should take only an estate for life, it was also his intention that the remainder should be protected by the artificial contrivances of the conveyancer. But this is only applicable to executory trusts; in other cases, even the express declaration that the first taker shall hold for his natural life, *and no longer*, or that tenant in tail shall not have power to bar the remainders, would be of no avail. In this State the expression, "without impeachment of waste," is disregarded, where, according to the rules of law, the limitation would be an estate tail. The danger of making the estate depend upon the indistinct particular intent, and in opposition to the broad general intent, which is in conformity to legal rules, is strongly expressed by Fearn himself, on another occasion. "Surely," says he, "it is better that the intentions of twenty testators, every week should fail of effect, than these rules should be departed from, upon which the general security of titles, and quiet enjoyment of property, so

essentially depend." If this be true in case of *wills*, which are viewed with so much indulgence, how much more of deeds, where parties have undertaken to be their own conveyancers!

If the court would undertake to model the trusts, in the present case, it would only be in consideration of the supposed discretion given to the trustees of the deed, in virtue of the words before referred to, "by such mode of conveyance," and, "in such terms and conditions," &c., but which carry with them nothing obligatory or explicit; but it must be borne in mind, that the power of the trustees to execute the trusts under the deed, has only been conceded for the sake of argument. If they have no power to convey a fee, the execution of the trusts must devolve on the court, and the court would certainly not exercise a discretion not necessarily implied, or at least where no rule is furnished by the instrument. The court, thus left to act, would not

undertake to conjecture the causes of doubts and fears, which might have existed in the breast of the maker of the trust, from his using the words, "as they may deem prudent and advisable;" for, under some circumstances the intention might best be subserved by leaving the limitations to follow the legal course, than, under other circumstances to prevent this by subtle contrivances. The court could not, if it were so disposed, judge of these circumstances without data furnished by the deed itself. There is nothing more specific in these doubts and fears than in every other case, when the best grounded hopes may be deceived. Chancellors have established the doctrine, in cases of executory trusts, *that they will not look beyond the present object of the settlement, and that it is no objection that it would enable the party to bar the remainders.*

In concluding this branch of the subject, I will give somewhat in extenso, the opinions of

English chancellors bearing on some of the principles asserted.

In Leonard vs. Stanly the chancellor uses this language: "In all these cases there is but one invariable rule, the intent of the testator collected from the will itself, and not *conjectured.* It is insisted on the part of the plaintiff, that it is a trust, and that this court uses greater liberality of construction in cases of trusts than of legal estates. I am of opinion that it is a trust; but I do not think that that circumstance will vary the present case, because words declaring a trust must be expounded in this court as they would be at law; otherwise the properties of mankind would be precarious; there would be one judgment here, and another at law. The distinction *between trusts executed, and executory, seems to be ill expressed; but when properly considered, appears to have good sense in it.* In all cases of the latter description, something is left to the judgment

of the trustees, and consequently of the court, which has to perform the office of counsel."

"I am then to consider for what persons this trust is declared, and who the testator intended should necessarily take the estate. And I must make this construction as agreeably as I can to the rules of law and equity."

"Where a man by his will makes a tenant for life, with remainders to one, two, three, four, or five, &c., of the issue of the tenant for life, and *then*, for want of issue, limits the estate over, this will be an estate tail in the first taker for life, by necessary implication; and this because the word *then*, before the limitation over, which is sometimes an adverb of time; yet it is sometimes a word of relation, and signifies as much as, *in such case*, and must have this effect, that upon the first, second, third, or fourth, &c., limitations failing, the remainder man could not

take, because of the words, 'for the want of issue,' and therefore unless the tenant for life, was construed to take an estate tail, it would descend in the mean time to the heir at law, because the contingency upon which the remainder man was to take, had not happened. But as the testator *certainly intended to dispose of his whole estate*, it has been construed a necessary implication, that tenant for life should take an estate tail, to carry the testator's intent into execution. But when there is an express estate for life, the court never enlarges this estate for the sake of the tenant himself, but merely for the sake of other persons who are intended to take by the will. To this it is objected, that you will introduce an estate tail, which will give the party an opportunity of defeating the limitations over. But this proves too much; for so it happened in all the cases cited at the bar; *for you cannot supply the defect and omission in the will, without giving tenant for life power to destroy the remainder.*"

In the case of Cook vs. Cooper, it was laid down by the court, that where "there is a general, and a particular intent, in a will, the latter must give way, where the former cannot otherwise take effect; and, therefore, though the court might best fulfil the particular intent by giving the first taker only an estate for life, yet, *the general intent being that all his issue shall inherit his entire estate, before it goes over, that intent can only be effected by giving an estate tail by implication, from the subsequent words, 'in default of issue.'*" In Wright vs. Pearson, the court said: "It is rightly admitted by the counsel, that the question as to what estate passes, must depend upon the construction of the whole will; and that the declaration of an express estate for life may be controlled by the general words, and dispositions of the will."

"Nay, it must be admitted now to be so, though the first devisory words had been nega-

tive, and gave *an estate for life only.* The reason of this is, that the testators attempt to annex qualities to estates which the law will not allow of; *they will give estates for life, meaning that they should have descendible qualities, wishing to have restrictive qualities to the first taker.* In these cases, therefore, the court considers the *substantial meaning.* The case of Colson vs. Colson, established this rule, only it separated the estate tail from the estate for life, by the interposition of trustees to preserve contingent remainders."

It must appear to the reader by this time, that the trusts in the deed under discussion, as in the foregoing case, can only be carried into effect *substantially;* that as the estate was intended for C M for life, and after, for her unborn issue *ad infinitum,* and not to go over until after a failure of all her issue, that estate must be enlarged to an estate tail, without regard to events and con-

tingencies, which may be conjectured, but which have not been expressed. One is reminded of the following language of Chancellor Northington, in the case of Rosseau vs. Reed: "It is therefore the fate of all courts upon wills, it is the peculiar destiny of this court on contracts, wills, and trusts, to be the authorized interpreters of nonsense, and to find the meaning of persons who had no meaning at all.

"Ex fumo dare lucem
"Cogitat, ut spaciosa dehinc miracula promat.

"A creative power is required to bring light out of darkness, and sound sense and specious determinations from unintelligible instruments. Civil polity, however, requires that there must be some superior seer, who is finally to arbitrate all disputes, with certain justice and unquestionable satisfaction—thank God it is not this court."

This reproach is not alone applicable to the

unlettered and the careless. The profoundly learned have been obnoxious to it, and most commonly in consequence of attempting something beyond the reach of human skill. Lord Coke censures Justice Richel for settling his estate on his seven sons in succession, in so curious a manner that the limitations were all void, for the want of seizin in the first taker; and yet Coke himself, it is said, settled his own estate in such a way as to puzzle the lawyers of his time.

3. The strictest analogy exists between legal and equitable estates. In equity, the trust is the land; there is an equitable as well as a legal seizin; when the word *seized* is used in acts of Parliament, it applies to both. There may be an equitable feoffment, an equitable fine and recovery, and an equitable tenancy by the curtesy. The few points of difference are accidental, and of no importance to the present inquiry. (8)

One of the English chancellors expressed himself in the following comprehensive manner: "This court has determined that such equitable estates are to be held perfectly separate and distinct from the legal estate. They are to be enjoyed on the same condition, entitled to all the same benefits of ownership, disposable, devisable, and *barrable*, exactly as if they were estates executed in the party; and the persons having them, may, without the intervention of the trustees, or the possibility of their preventing them from exercising their ownerships, act as if no trustees existed, and this court will give validity to their acts." (9)

Equity adopts all the rules of law applicable to legal estates. In equity, as the trust is the land, so the declaration of the trust is the disposition of the land. Lord Mansfield said, on one occasion: "Twenty years ago I imbibed this principle, that the trust is the estate at law in this

court, and governed by the same rules in general, as all real property is, by imitation." In Pennsylvania, the person in possession under a trust, and entitled to the equitable estate, is to all intents and purposes the legal owner. It was further observed by Lord Mansfield, "that the trustee can transmit no benefit, but is to hold for the benefit of those concerned. The trustee is considered merely as an instrument of conveyance, and therefore is in no event to take a benefit; and the trust must be coextensive with the legal estate of the land." (10)

If we lay aside those vague expressions whose meaning can only be conjectured, as to the *time*, the *portion*, *mode of conveyance*, allotments of *parts of the land*, such *terms and conditions*,

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(8) (9) (10) 1 Sand. Uses, 315, 327. 3 Vesey, 127. 1 Sand., 269. 2 B. C. C., 26. 1 Eden, 227. 1 Fonb., 37. Fearn., 324, 325, 308. 1 Eden, 224. 2 Fonb., 326. 1 Yates, 313. Atk., 603. 12 Sergeant, 460.

&c.,—too indefinite for the trustees to act upon, or the court in their stead, (which would serve to make those the bestowers of the benefits, or *creators* of the trusts,) then there is nothing in the case but a trust to secure to C M an estate for life in the rents and profits, which in equity is the land itself, and afterwards on her marriage, a legal estate to the same extent, with an inheritance to her children, which cannot take effect without giving her an estate tail by implication or operation of law. There cannot be a doubt that an estate of inheritance was intended *for C M and her issue;* but the deed is silent as to the manner in which this is to be effected, that is, whether it is to be taken by C M, *or* her issue; it must therefore be determined by the rules of law, which give that estate to the first taker.

Cestui que trust, in tail, in possession, can bar the remainders; and the only mode by which it could, according to the English law, have been

prevented in the case before us, is the following: By limiting the estate to *C M for life, remainder to the trustees during the life of C M, remainder to the heirs of the body of C M, or other persons.* As this is a trust by deed, (and not by will, where a future estate or *executory devise* may be limited without any particular estate to support it,) there must always be an estate to vest *in presenti*, immediately on the termination of the preceding estate. This is equally applicable to equitable, and to legal estates. There must always be some one ready to take the beneficial interest, as in legal estates created by deed there must always be some one ready to be *seized* of the legal estate. In a will, this may be in suspense by way of executory devise; but in a deed, a contingent remainder, or a contingent springing use, must always have a particular estate to support it; which, in respect to the legal estate, must be an estate of freehold, but in a trust, it is sufficient that there be a *vested* equitable estate, though less

than a freehold. In either case, there must be no broken link—no hiatus, even for a moment. Hence, springing uses in a deed, require a preceding vested estate to support them; and if this be wanting, all the succeeding limitations must fail. The estate of C M is the only vested legal estate which precedes that of her unborn children; it is indispensably necessary for their support; take it away, and every estate after it, which is contingent, must fall to the ground. (11)

The limitation to the unborn children of C M, if made to vest on or before their attaining twenty-one years, might have been good in a will by way of executory devise; or in a deed by way of springing use, if made to vest immediately *on their birth*, and a child *in ventre sa mere* is considered as born for this purpose; but under the present mode, it could neither take effect in a

(11) 5 Bacon, Abr. Uses. 2 Fonb., 90. 1 Prest., 355.

will, nor in a deed, because it is only to vest on their *marriage*, which violates the rule of perpetuity. If the vested equitable estate of C M were not connected with the estate of the issue, then after her death, leaving children unmarried, there would be no one to take the rents and profits, or the equitable estate, and the consequence would be, *that they would return as a resulting trust to the heirs at law of the feoffor, and the remainder over would be defeated, as well as the limitation to the children of C M.* To prevent this effect, the court must necessarily have recourse to the general intent of the feoffor. In doing so, it is true, a door will be opened to the tenant for life to bar the remainders, while it saves the limitation to the unborn children; but the English chancellors say that it is no objection that a power may be thus incidentally given to the first taker; and according to the spirit of our laws and judicial decisions, *that is not only not objectionable, but very desirable.*

The law is laid down in Fonblanque as follows: "There must be a person seized to such use [springing use] when the contingency happens; therefore, if the cestui que trust, in tail, by discontinuance, or the feoffee to uses, or the person out of whose seizin the use is to be served, by alienation or otherwise, destroy his estate, or his possibility, the use is destroyed for ever. Whereas, by an executory devise, the freehold itself is transferred, and there needs no person to be seized, to execute the estate in the devisee." But here the stern rule against perpetuities interposes. "Every future interest," says the same author, "springing, or secondary use, must be so limited as *necessarily* to take effect, if at all, within a life, or lives in being, and twenty-one years and some months."

As to the interpretation of wills and executory trusts, I will take the law as laid down by the counsel in the case of Stanly vs. Leonard, as the

doctrine was admitted to have been correct: "The words out of which the estate tail is to be supplied, are 'for want of such issue.' There would have been the same intention to prefer the male issue, if the words, 'for the want of such issue,' had been expunged; yet no court of justice would have inserted another limitation, though they will supply *words*, when there are words to supply them out of, because they *expound* only, and do not *make* persons' wills. But the testator in the present case has supplied words, to wit: 'for want of such issue of Samuel,' and afterwards, 'for want of issue of both my said children,' or 'if their issue should die without issue,'—here are words of limitation, and the next in remainder can never take until these contingencies happen."

Nothing can save the limitation to the children of C M, as purchasers, but the *interpretation* which would give them an estate on their coming

of age, which, according to legal decisions, would vest on their birth; but this cannot be done without expunging the words "allot on their marriage," which precludes all idea of any interest vesting immediately on their birth. But in a will, or trust deed, the words "dying without issue," are words of limitation, unless the contrary expressly appears, or other words are superadded, showing clearly the intention that the estate of inheritance shall begin with the issue, and not with the first taker. So that in the present case they could not take as purchasers, even if the insuperable objection of perpetuity were not in the way. If the trustees had been empowered to allot marriage portions to the children of C M, in her *life time*, remainder for life to those living at the time of her death, remainder in tail to the grandchildren, and then remainder over on their dying without issue, the question might have arisen, whether by this

method, the estate for life of C M could be separated from the inheritance, without special trustees; and in my opinion it could not. But the time for the estates of children to vest is positively fixed, "on their marriage," without any provisions for possible contingencies, and the time *may* extend beyond the period of twenty-one years, after the death of the parent, which is fatal. These words cannot be expunged. The expressions, "by such mode of conveyance," and "on such terms and conditions," do not give words out of which other words may be supplied by the court; they are too uncertain to enable the chancellor or the trustees to *interpret* the limitations, and neither can *make* them. If the children take in virtue of the words, "dying without issue," annexed to the limitation to their parent, they take by inheritance, which ends the question; and they cannot take in virtue of these words annexed to the limitation to them, because they cannot take by *implication*, as

we have seen that an unborn person cannot thus take. (11)

As a limitation to take effect either as an executory devise or springing use, is void after an indefinite failure of issue, and the legal import of the words, "dying without issue," carry that meaning generally, the court has sometimes, in wills, taken advantage of other expressions in the instrument, to give it a more restricted meaning, or, as it is expressed, "to tie up the generality" of those words, so as to mean the leaving issue at the time of the death. If this were a will, and there were any words either expressly narrowing the meaning, or necessarily implying it to be so, then perhaps a question might arise as to the construction. But the question could not arise on a deed,

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(11) 1 Croke, Eliz., 439. 1 Rep., 129. 2 Fonb., 90. 1 Eden, 87. Fearn, 56. 2 Vesey, 646. Fearn, 53, 58, 465, 246. 6 D. and E., 213. 7 D. and E., 652. Cornish, Uses, 13. 1 B. C. C., 75. 6 Cruise, 325. 2 Str., 1175. 9 Mass. Rep., 514.

and even if it were the case of a will, it would not save the limitation to the unborn children, because it tends to perpetuity. In short, if the feoffor could, by any contrivance, give an estate tail to the unborn children of C M, by an instrument drawn in the proper manner, it is certain that this has not been done; and without such estate in the children, they could not transmit the estate to the grandchildren, who are plainly intended to succeed, according to the expressions, "if the children of C M die without issue." (12)

The conveyance of the legal fee to trustees, according to Fearn, and other writers, merely takes the estate out of the grantor, subject to the undercurrent of equitable limitations, which possess all the substantial constituents of estates purely legal. The law is equally applicable to these as to legal estates; words receive the same technical *interpretation* in trusts fully declared; and in those which are executory, or imperfectly

declared, they still receive a technical interpretation and effect, where the intention to the contrary does not appear by plain express words, or necessary implication. And in modelling trusts, the chancellor will not insert clauses to prevent the barring the remainders, unless expressly required to do so by the feoffor. There can be no doubt but that the act of assembly of Pennsylvania applies to equitable as well as to legal estates, as the word seized, according to the English decisions, applies to both. Cestui que trust, in possession, in this State, is in fact the legal owner, as he cannot be evicted by the trustee; and this, more especially, when the time is past when the legal conveyances ought to have been made. In Massachusetts, where, as in Pennsylvania, there is no court of chancery, the courts are disposed to construe trusts as uses under the Statute of Uses; that is, transferring the possession to the use, or, in other words, the legal seizin of the trustee to the equitable seizin of the person

beneficially interested. In New-York this has been done by legislative enactment, although the wisdom of this course, in both cases, may be questioned. ([13])

4. Estates tail by implication, or operation of law, derive their support principally from the rule in Shelly's case, and this may be referred again to the maxim, *Non est hæres viventis*, or, according to Blackstone, "A man in his life time carries all his heirs in himself." Where an estate is limited to a person for life, and in the same instrument to the heirs of the body of that person, the two estates unite in the tenant for life, and he takes an estate tail. The same thing prevails as to the equitable estate in trust deed, or in a devise,

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(12) (13) 1 Coke, 99. 3 Vesey, jun., 357. 2 Fonb., 149. Fearn, 400, 430, 432, 501, 502. 2 Fonb., 97, 128. 4 Dane's Abridgment, 245. 7 D. and E., Doe vs. Syboun. Do. 47. Goodtitle vs. Jones. 4 Dane, 251. 2 Eden, 6. 1 P. W., 199. 2 Fonb., 6, 7. 1 Burr., 38, 52. 7 Beam, 177. See also authorities in the succeeding reference.

where other expressions of equivalent import with "heirs of the body," such as issue, offspring, children, are used in a collective sense, and not in reference to any persons then in being. The estate tail, by operation of law, is where no express estate is conveyed, but plainly implied from the intent; or where, in order to carry that intent into effect, it is necessary to enlarge an express estate for life, to an estate in fee, without which the issue of the first taker could not succeed to the inheritance, although plainly intended. It being the wish of the feoffor, or devisor, that the issue should take, it will be presumed to be a secondary consideration, whether they take by purchase directly from the feoffor or devisor, or through their ancestor by inheritance; or even if it appear to have been his wish that they take by purchase, it is a reasonable presumption, that if they could not take in this way, that they might take by inheritance, rather than not at all. Hence, the words after the estate for life, and "if he die

without issue," create an estate tail; because it is clearly implied, that while there is issue of the tenant for life, and that issue has issue, it is to be possessed by them; and is, in fact, the same thing as if given to the tenant for life, and to the heirs of his body, which is an *express* estate tail. (14)

There is scarcely any legal principle sustained by so many adjudged cases as that which gives a legal effect to the words "dying without issue," and establishes their controlling influence over the instrument in which they are used. They are so potent in their operation, that they will reduce

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(14) 6 Vesey, 646. 1 Atk., 603. 3 Vesey, 127. 1 Sand., 278. 1 B. and B., 44. 2 B. C. C., 26. 1 Sand., 279. 1 Binney, 255. 1 Dallas, 48. 1 Eden, 224. 2 Vesey, 246. Fearn, 321. 1 Dallas., 72. 1 Sergt. and Binney, 30. 9 Sergt. and Rawl, 180. 1 Binney, 71, 91. Yates, 341. 1 Yates, 12. 6 Binney, 191. 12 Sergt. 460. Fearn, 61, 67. Cowper, 379. 2 Bacon, 60. 7 Mass. Rep. Fearn, 321. 1 Binney, 258. 1 Yates, 374, 400, 414, 313. 7 D. and E., 47. Cowper, 23. Bull., N. P., 110. 2 D. and E., 698. 7 Do. 47. 8 Do. 2, 122. 5 E., 138. 2 Johns. Rep. 84. 3 Do. 422. 1 Binney, 133. 1 Hen. and Mumf., 228.

an estate in fee simple to an estate tail, and enlarge an estate for life, although followed by negative words, into a fee tail. In Wild's case, it was laid down that if land be devised to A and his children, or issue, and he has none at the time of the devise, the same is an estate tail; for the intent is, that the children or issue shall take. In the case of Lee vs. Bray, which was that of a trust deed, it was laid down that a limitation to the use of the feoffor's son, and his heirs, and for the want of issue of him, remainder over, is an estate tail, on the well settled principle, that the latter words, "issue of him," restrain the prior and more general words, "his heirs." In the case of Darly vs. Darly, there was a devise to A, and, "if he die without having issue of his body," then over. A had an estate tail, in virtue of the words "if he die without having issue;" without these, A would have taken an estate for life. In Hodges vs. Middleton, there was a devise to A *and her children on their marriage*, and if she die without

issue then over; held an estate tail in A. Devise to C *if she married and had issue*, then after B's death in fee; an estate tail in C though not married, and without issue. In Wild vs. Lewis, A devised to B, his wife, all his lands, and if she had no children by him, and for want of such issue then over, held an estate tail in B. The doctrine has been carried farther in the case of Robinson vs. Robinson than any previous decisions, and this case has been acknowledged to be law in Pennsylvania. It goes much farther than our case, because there were words *expressly negativing the idea of any other estate than for life*. R devised lands to L H for and during his natural life, *and no longer*, and after his decease to such sons as he shall have lawfully begotten, and for default of issue, then to W R in fee; held that L H by implication, to effect the general intent of the testator, took an estate tail, because it appeared that W R was not to take until after a failure of issue of L H. He

had no son at the time of the devise. In the case of Broughton vs. Langly, where lands were devised to trustees to permit B to take the rents and profits for life, and after his death to the use of the heirs of the body, held that B took an estate tail. The case of Stanly vs. Leonard, already cited, is a strong one on this subject. The pith of the decision there, was simply this, that as it appeared from the general intent, as manifested by the words, "dying without issue," that the entire estate was to be enjoyed by all the issue, *ad infinitum*, it was necessary to give the tenant for life an estate tail. (15)

The doctrine of estates tail by implication from the words, "dying without issue," has been

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(15) See cases last note. Doug., 753. 1 Wils., 105. 2 Fearn, 38. 9 Wheaton, case of Thompson Mason. Fearn, 245, 246. 1 Salk., 120. 1 Dall., 139. 1 Hen. and Mumf., 290. 3 Salk., 337. 6 D. and E., 307. Doug., 431, 434. 2 Vern., 536. Fearn., 112. 2 Fonb., 90, 97. 2 Fonb., 58, 316. Comyn, Dig., 398, 394, 400. 4 D. and E., 294. 6 Cruise, 325. 2 Wils., 232. Eden, 87. 2 Yates, 374.

adopted in this State, and even with a greater latitude. In the case of Carter vs. McMichael, Chief Justice Tilghman, who delivered the opinion of the court, declared that it was an estate tail in the tenant for life, "although *it was manifest from the words of the will*, that the testator did not intend that he should have more than an estate for life; for he not only declares most expressly, that it shall be for and during the term of his natural life, but further prohibits him from committing waste or the destruction of timber thereon; thus depriving him of all privileges other than those of mere tenant for life. But in order to carry into effect the general intent of the testator, the court finds itself compelled to disregard and overrule this particular intent." (16)

In the case of Paxen vs. Lefferts and another, Judge Kennedy, delivering the opinion of the

(16) 10 Segt. and Rawl., 429.

court, says: "The words 'during his natural life,' it is true, are superadded, but it will be seen that these words have no effect, when they are opposed to the general intent of the testator, as in the case already cited, [Carter vs. McMichael.] In that case, the general intent of the testator was, that the male issue of Edward should take, to the exclusion of all others, and that the estate should not go over, *so long as there was any of such issue in being*. This intent, however incompatible with a mere life estate in Edward, and consistently with the rules of law, could not be effectuated but by giving to him an estate tail male under the will, which was accordingly done by the decision of the court. Against this it has been contended, that by the very terms of the devise itself an *estate for life only* is given to Charles. To this an answer has already been given; which is, that in the construction of wills, to effect the general and main intent of the testator, where he has, in limiting the duration of

an estate devised, used the words, 'for his life,' 'during life and no longer,' they are set aside and disregarded." (17)

In the construction of a trust in a deed, the same rule prevails as to the general and particular intent as in a will; and even in a deed, where the general intent cannot take effect but by an enlargement of the estate for life. It must be understood, however, that the wishes of a testator will be carried into effect, as in the instance of an *executory devise*, while a trust in a *deed*, will be made to conform more rigidly to the rules of law, as we have seen in the comparison between the springing use and the executory devise; the former requiring a particular estate to support it, while the latter does not require such estate. Fonblanque considers it a strange oversight in Blackstone, in not distinguishing

(17) 3 Rawl's Rep., 74.

between deeds that take effect by way of use, and those which are at common law. Preston clearly marks the distinction.

It may be proper to repeat what has been already said in the course of this opinion, that if the trustees have an unlimited and undefined discretion, *as to the time, mode of creating, and extent of the trust estates*, they must necessarily possess a power to defeat them altogether, and this must be a general power of appointment, which would enable them to convert the estate to their own use, but which is expressly negatived by the deed. If, on the other hand, they do not possess such a power, the estates must be determined *by the deed which creates them*, and the technical rules of law must be taken as the guide; and if the general intent, which is to confer an estate on C M and her issue, in *perpetuity*, can only be accomplished by giving to C M an estate tail in the first instance, then she takes

that estate; and this, I think, has been fully proved. There is one thing absolutely and positively certain, and that is, if she does not take such estate, her issue, unborn at the time of making the deed, *cannot* take less than an estate tail; and the question which must fairly arise is, whether she must take it in the first instance, or must be postponed to her unborn issue. But as that issue cannot take at all, excepting through her, she must in the first instance take the estate tail for their benefit. It is only this substantial or leading object of the trusts, which the court can execute with the rules of law as the guide; as to the other objects, the feoffor has not expressed them distinctly, has furnished no rule or data for their execution, but seems to have left them to that vague and undefined discretion, which may be governed by a thousand considerations in the breast of an individual in disposing of his own property; by motives sometimes good, sometimes bad, just or injust, by

proper and wise reasons, or by mere whim or caprice; and yet the very instrument itself puts a negative upon this, by giving the right to legal remedy to compel a proper execution of the trusts! And what, in the judgment of the court, would be deemed a proper execution of the trusts? The answer is plain. It is the carrying into effect the general and particular intent, as far as they can be ascertained, in conformity with the rules of law, and disregarding the undefined discretion apparently confided, *personally*, to the trustees; a discretion which the court *cannot* exercise, and yet it may be called upon to execute the trusts! This discretion of the trustees, by which the estate to C M and her issue is apparently embarrassed, must be set aside and disregarded. Either this must be done or C M and her issue can have no distinct or definite equitable rights under the deed, independently of the trustees, entitling them to call upon the aid of the court to decree A PROPER EXECUTION OF THE

TRUST, IF REFUSED OR NEGLECTED BY THE TRUSTEES. By the construction upon which I have insisted, wrong is done to no one. The nieces of the feoffor have no vested estate; their estate depends on the contingency of C M, or her issue, dying without issue, and they stand in the same situation as other persons having remainders contingent on the failure of a primary disposition. As to them there is no difference in their expectency under this deed, and under a common estate tail. It is even of less value, because the estate might have been sunk by the trustees for the support of C M. As to the issue of C M, it has been sufficiently shown that it is to their benefit that their ancestor take the estate of inheritance in the first instance. The court will not presume that any higher estate was intended for them than for the parent and first taker, when the contrary is evident, by the power given as just stated, to sink the estate for C M if necessary; and this remarkable clause in the deed

cannot, by any construction, be narrowed so as to apply to her only until her marriage; it looks *before*, and *after* that event, and occurs after the other clauses. The only ground on which the nieces can object is, that it was not intended that the remainder should be barred. But it has been shown, that according to the English law, the barring can only be prevented by a technical settlement, when such settlement has been expressly directed; and in the present case no such direction has been given. In Pennsylvania, the act of assembly is unqualified; and once assume that it is an estate tail, and the power to bar necessarily follows, even if there was a court of equity competent to carry into execution an *express* intention of the feoffor, in decreeing a strict settlement, as in England, in cases of executory trusts.

Since the foregoing opinion was written, some important decisions have been made in the Su-

preme court of Pennsylvania, completely sustaining the doctrines laid down, and in fact scarcely leaving a "loop to hang a doubt upon."

In the case of Casky vs. Brown, 17 Sergt. and Rawl, 441, Judge Huston uses this language: "Because the construction settled goes as near the intent of the testator as any one could devise, and therefore ought to remain untouched. This is always to be ascertained to a certain extent, *though what the testator would have directed, if certain events had been foreseen, is at best conjecture.* The *general intent* is to give the child an estate of inheritance, but one which must go to the children of the devisee, which yet cannot be sold or bequeathed by the devisee, the remainder of which, if the devisee has no children, the first testator directs to go in a certain way. Now this is the very description of an estate tail, no more liable to be mistaken than the strict legal definition of one. But an estate tail may be changed into

a fee simple, by common recovery, or, in this State, by a conveyance in the prescribed form; and if this is done, *the remainder is gone to be sure, but the child is supported, is not left to charity or to starve.*

"If it is not questioned, and I believe it cannot be, that this devise created an estate tail in Susanna, provided the words, 'die without issue,' mean an indefinite failure of issue; then the devise is a perfectly legal one, an estate in fee tail, remainder over to her sisters, or their children. If we could ask her father now, whether he intended, if she lived unmarried till the age of one hundred, the lot is to remain unimproved and unproductive, and she to depend on her labor, or on her sisters, or on the charity of strangers, I have no *doubt* what would be his answer; and that answer would be, *that he meant it as an estate available for her support.* I can find nothing here which goes to contradict this;

but I have said that *an estate tail cannot be so restrained, that tenant in tail cannot change it into a fee.* Many a man has wished it unchangeable, and that the land he left might be confined to his posterity for ever. The British Parliament attempted it in vain. The remainder even in tail will always complain. Once in a century a judge may be found to join in the cry. Public convenience required, and public opinion has sanctioned the device which renders estates tail alienable, and I am now satisfied that public convenience occasioned and has justified the construction put on the words 'dying without issue,' or 'dying without leaving issue;' and that however the case may be after the death of the devisee, it would in most, if not in all cases, thwart the will of the testator during the life of the first devisee, to construe those words in the way sometimes contended for."

In the case of Hoffner vs. Knepper, decided

as late as 1837, Judge Kennedy, in delivering the opinion of the court, after referring to the foregoing, affirming and recognizing it as law, declares that "the attempt in this, as in former instances, is to construe the limitation over an *executory devise*, by considering the 'dying without issue' the same as 'leaving issue.' But the construction with us has always been that the words 'dying without issue,' refer to an indefinite failure of issue. ([18])

"These decisions may be considered as having established a rule of property, under which many titles to real estate are held, and which it is of the first importance should be preserved uniform and stable, as well for the security of property held under it, as for the furnishing a guide to the ascertainment of title in future."

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(18) See 2 Yates, 400; the word *survivor* makes no difference. 3 Sergt. and Rawl, 470. 4 Do., 409. 17 Do., 441. 1 Wheat., 139. 4 Kent's Com., 267.

When the foregoing opinion or argument was first drawn up by me, I resolved to submit it to some eminent lawyers for examination. I preferred those of Maryland, because there the entailment of estates has been more favored than in Pennsylvania, where in fact it has always been regarded with a jealous eye; and because in Maryland there is a court of equity, which could carry into effect an executory trust, by decreeing a detailed settlement of estates, according to the particular intent, which, for the want of such court, cannot be accomplished in this State. The gentlemen to whom the case was referred, were Mr. Magruder and Mr. Taney; the former now one of the Judges of Maryland, and the latter Chief Justice of the United States.

Mr. Magruder thus expresses himself: "When you have the opinion of so distinguished a lawyer as Mr. Taney, who is confessedly the ablest man in that profession resident in Maryland, and

who, upon questions relating to real estate, has no superior probably in this country, it is scarcely necessary for me to add my opinion to the same effect. I had come to the same conclusion before I handed over your argument into his hands, and so informed Mr. Taney in the conversation we had at the time I left it with him."

The following is the material part of the opinion of Mr. Taney:

"I have examined the case stated by Judge Brackenridge, and read attentively his able argument upon it.

"As it is impossible, according to the rules of law, to gratify the whole intent of the grantor, and it being a case of real estate, I think the words, 'if the said C M die without issue,' ought to receive a strict technical interpretation, and be construed to mean an indefinite failure of

issue, and not merely a dying without issue living at her death; and in this view of the question, C M took an estate tail. The estate supposed to be vested in her, is, it is true, a trust estate, but that does not alter the import of the words referred to. And by affixing this interpretation to the language used in the instrument, the general intention of the grantor is perhaps better accomplished than it would be by any other construction.

"A decision according to the opinion above expressed, would, in some important particulars, disappoint the wishes of the grantor, and the argument in favor of treating it as an executory trust would have great force; the trustees to hold the land in trust for C M, during her life, subject, however, to the power in the trustees to make suitable provisions for her children on their marriage, and after the death of C M, to convey the whole property to the children in tail. Yet,

in this view of the case, so many contingencies are totally unprovided for, and the directions in the instrument altogether so imperfect, that I think they can hardly justify a chancery court in prescribing a detailed settlement of the estate, and ascertainment of the proportion of each child, under all the circumstances which might afterwards happen. If C M should have children, it is manifest that many contingencies may arise, for which the grantor has not provided himself, and in regard to which he has vested no discretion and authority in the trustees. The safest interpretation is, therefore, that which applies to the instrument the technical rules of interpretation, and these rules, in my opinion, decide it to be an estate tail."

It will be seen that the last paragraph supposes the existence of a court of chancery, with its assumed power of modelling executory trusts; but even in this case, Mr. Taney is of opinion

that the legal construction would, from necessity, prevail. It is also remarkable, that in his mind the interposition of the chancellor would be with a view of postponing the alienation in favor of the children, to whom an estate tail at all events must be given. But in the opinion as at first presented to Mr. Taney, I did not sufficiently advert to a very important principle, which now forms one of the main points in this argument, as it at present stands, since it was recast by me, and thoroughly sifted. That principle is now self evident. It is this: The limitation to the children is void, because the period fixed, *their marriage*, is too remote, and *may* endure beyond the legal time allowed for the estate to remain in suspense. If by any possibility the period *may* be extended beyond the twenty-one years, after the death of the tenant for life, it is bad. The marriage portions might be assigned to the children in the life time of C M, or within twenty-one years after her death; but they might *not* be assigned for

more than that length of time after her death, and this *possibility* is fatal. Until their marriage, the children could not claim such marriage settlement, and what the trustees might be pleased to do or not to do, in the meantime, is a mere matter of surmise, upon which the court could not act, nor would there be any rule by which they could reform the acts of the trustees. The legal construction would therefore be the only safe one, even for a court of chancery, and as we have no such court, there can be no alternative.

As to the observation of Chief Justice Taney, that "the argument in favor of treating it as an executory trust, might have great force," the answer is, that this not only supposes the existence of a court of chancery, but also, that the trustees, who are to be the conveyancers in the first place, and the chancellor in the second, (according to the case before cited) have sufficient legal seizin in the feoffment to them, to

enable them to convey a fee. The execution of the trust *must, therefore, necessarily devolve on the court, or be effected by presumption or operation of law, in virtue of C M being in the actual possession and enjoyment of the land.* This is a conclusive answer to the supposed argument. The difficulties of the case evidently suggested themselves to the distinguished lawyer whose opinion has been used on this occasion; but it appears that in looking around he could find no safe interpretation but the legal one, which makes it an estate tail, and of course convertible into a fee simple by simple alienation.

In conclusion, the construction of this instrument of writing mainly turns upon the words, "if C M die without issue." As an independent or separate limitation, held in suspense in the hands of the trustees, to be executed on the happening of the future contingent event of C M having children and their *marriage*, we have seen

that it is too remote, and the directions too imperfect; it is therefore a particular intent, which must be disregarded and passed by, as if it were not in the deed. Yet, if a presumption arises in favor of giving to C M an *implied* estate tail, because it is plainly inferred from the words, "if she die without issue," that if she have issue, they shall inherit from her, that presumption is rendered certain, by the express declaration of the desire of the feoffor, that the estate shall go to her children, and the issue of these children, indefinitely, and only in the event of the want of issue, go over to the nieces. Although too imperfect for execution, still it serves to fortify that implication, which, according to the foregoing decision, gives to C M an estate tail for the benefit of her issue. The instrument then must be read as if it closed at the words, "and C M die without issue," and every thing relating to the children were struck out. That the trust to *settle* and *assure*, is obligatory, is plainly established

by the fact, that final disposition of the estate is made to depend on the contingency of C M, or her issue, dying without issue. There is no authority to convey to the nieces in any other event. If in the exercise of the vague discretion apparently given, it be determined that they *may not* settle and assure, then the estate must remain undisposed of; for there is no direction, in case of such refusal, to convey the fee simple to the nieces, as that is made *positively* to depend upon the contingency of C M dying without issue. Unless, therefore, it be considered obligatory to settle an estate tail on C M, the contingent remainder will also be defeated, as well as the general intent in relation to C M and her issue.

In the meantime, the general intent of the feoffor in the course of events has been actually accomplished. C M has been supported, she has married and has children, the land has been

greatly improved under the judicious management of her husband. Would it not be strange if, after the lapse of many years, a set of trustees, unknown to the feoffor, and of course never possessing his confidence, should, in the exercise of a vague and undefined discretion, take away this property, under the pretence of a particular intent conjectured from the deed, and thus defeat the evident general intent? Can it be supposed, if his voice could be heard from the grave, that he would not prefer to see the management of the estate, intended to provide for the support of C M and her children, under the direction of those for whose benefit the trust was created, rather than in the hands of strangers whom he never knew? It is impossible to give any construction to this instrument different from that which has been given, without defeating the principal object, and doing great injustice to the possessors of the estate, who have expended their time, attention, and money, in rendering a

property productive which before was not so. Finally, if it were possible that the trustees should attempt to interfere at all, it could only be to convey a part, or the whole, to the nieces. But the deed gives them no vested interest; it is placed beyond all question that their interest is purely contingent; it depends not on the exercise of their discretion, *but on the death of C M, and her failure of issue; to that event alone is the equitable estate of the nieces restricted.* This decision is, therefore, in conformity to the intention of the feoffor, agreeable to equity, and in accordance with the settled rules of law.

APPENDIX.

A.

DEED OF TRUST.

KNOW all men by these presents, that I, A B, of, &c., for and in consideration of one dollar, to me in hand paid, by C, D and F, of, &c., the receipt whereof I do hereby acknowledge, and for other good causes and considerations, have granted, bargained and sold, &c., to the said C, D and F, and to the *survivor, or survivors of them*, and to the executors and administrators of such survivor, all those nine tracts of land situate, &c.; to have and to hold the same, to the said C, D and F, and to the survivor, &c., UPON TRUST AND CONFIDENCE that they will, from time to time, let and lease the same to such tenants, and for such rents as they may approve, and on the receipt of

the rents and profits thereof, that they dispose of the same in the manner that to them may appear most prudent and advisable FOR THE SUPPORT OF C M, DURING HER NATURAL LIFE, *if she remain unmarried, and if she marry and have children,* that they MAY, *at such time, and by such mode of conveyance, as to them may appear most prudent and advisable,* SETTLE *and* ASSURE *to her such* PORTION *of said land as they may deem proper for her support,* DURING HER NATURAL LIFE, *and allot to her children, respectively, on* THEIR MARRIAGE, *such parts of said land as they may think proper to be given them, and on such* TERMS AND CONDITIONS *as they believe most advisable.* And in further trust that, if the said C M DIE WITHOUT ISSUE, that the said C, D, F, or the survivor, &c., shall then convey *the said land* to M, H, A, daughters of my late brother, &c., to be equally divided in FEE SIMPLE. And, also, in further trust, that if THE CHILDREN OF C M DIE WITHOUT ISSUE, then in *that event* to convey the said land to the children of my brother, &c. And I do hereby declare, that it shall be a good and complete

execution of the trusts, if the said C, D, F, the survivor or survivors of them, shall, by deed under their hands and seals, respectively, appoint three or more trustees to execute this trust, as the said C, D, F, shall *associate with themselves*, &c., that then such appointment shall, thenceforth have the same power and authority, &c. And I do hereby further declare, that the trustees first named, and the survivors, &c., may, in the execution of their trust, *advance money to the said C M, for her support and maintenance, and that the lands hereby granted shall remain bound for the repayment of the same, with interest, and if it be found necessary and expedient, a part of the land may be mortgaged, to repay such money out of the rents and profits thereof.* And lastly, I do hereby declare, that it is my clear intent and meaning, that the complete *legal estate* of the premises hereby granted, is absolutely vested in the said C, D, F, to be disposed of by them, in the manner before mentioned; and that *neither the* SAID C M, *nor any* HUSBAND *she may have, nor any of her* CHILDREN, *shall have any estate, title or interest, whatever, in the same, either at*

LAW *or in* EQUITY, *unless by express grant in writing of the trustees, or* FROM PERSONS DULY APPOINTED BY THEM. *But this declaration is not to be understood as precluding legal remedies to* COMPEL *a proper execution of the trusts* CREATED, *should the faithful discharge of them be* REFUSED *or* NEGLECTED."

B.

Act of Assembly of 16*th January*, 1779. *Purdon's Dig.*, 189.

SEC. 3. Any person or persons, *seized of any estate tail, in possession,* reversion, or remainder, shall have full power to grant, bargain, sell, and convey any lands, tenements, or hereditaments, whereof he, she, or they, shall be so *seized,* by such manner and form of conveyance, or assurance, as any person *seized of an estate in fee simple,* may by the laws of this State grant, bargain, sell and convey, any lands, tenements, or hereditaments, whereof such person is seized in fee simple; and all and every such grants, bargains,

sales and conveyances of any person or persons, so *seized in tail*, shall be good and available, to all intents and purposes, against all and every person and persons, whom the grantor, bargainer, or vender, might or could debar by any mode of common recovery, or by any way or means whatever.*

C.

Stat. Limit., March, 1785.

Sec. 8. From henceforth, no person or persons whatsoever, shall make entry into any manors, lands, tenements, or hereditaments, after the expiration of twenty-one years, next after his, her, or their right or title to the same first descended or accrued: nor shall any person or persons whatsoever have or maintain any writ of right, *or any other real, or possessory writ, or*

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* Note by Mr. Purdon.—"I devise the residue of my estate to A, *during the time of his natural life*, and if he leaves lawful issue, then I give my real estate unto such issue; or they dying under the age of twenty-one years, then I devise all my real estate to B, his heirs and assigns, on condition, &c. A takes an estate tail." 1 Dall., 48.

action, for any manor, lands, tenements, or hereditaments, of the seizin or possession of him, her, or themselves, his, her, or their ancestors or predecessors, nor declare or allege any other seizin or possession of him, her, or themselves, his, her, or their ancestors, or predecessors, than within twenty-one years next before such writ, action, or suit so hereafter to be sued, commenced, or brought.*

FACTS OF THE CASE.

The deed was duly executed and recorded in the year 1815, and the maker soon after died. The trustees undertook the trusts; proceeded to lease the lands, and apply the rents to the support of C M. These not being sufficient, they advanced money on the land for the purpose. In 1827, C M married, on which the trustees surrendered to her and her husband the title deeds, and the

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* By twenty-one years possession. a positive title is acquired.—5 Sergt. and R., 240. See Boon vs. Chiles, 10 Wheat., and the very able opinion of Justice Baldwin.

possession of the land, giving a written order to the agent to pay over the rents due. An arrangement was made, by which a small part of the land was laid out in town lots to pay the sum advanced for the support of C M while unmarried. C M had children, and she and her husband held possession of the land without further interference on the part of the trustees. They made extensive improvements, and paid large sums of money to bring the land into a productive state. Those expenditures have exceeded the aggregate amount of the rents. The question is, by what legal tenure C M, and her husband, and children now hold the lands? Had they no equitable right under the trust deed, independently of the action of the trustees? And what is the nature of such equitable right or estate? These are the questions discussed in the Essay. In the opinion of Chief Justice Taney, it is an estate tail in C M; but if considered as an executory trust, the court of chancery might possibly settle the estate on C M for life, giving the estate tail to her children; but the deed is so imperfect, and so many contingencies are unprovided for,

that it would be safest to let it take its legal course, and the law makes it an estate tail in C M. In Pennsylvania, as there is no court of chancery, such a settlement could not be made, even without the objections from the imperfect provisions of the deed. It is, therefore, a barrable estate tail in C M.